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Petitioners,

v.

Robert M. Gates,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, unconstitutional, inasmuch as the statute (a) was retroactively applied to those divorced servicemembers who entered the armed forces prior to its enactment; (b) invidiously discriminates against retirees of the armed forces; (c) contains garnishment mechanisms that do not afford sufficient procedural due process to divorced armed forces retirees; and (d) has provisions that permit divorce courts of different jurisdictions to treat armed forces retirees differently?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption, except that Donald H. Rumsfeld was sued below in his official capacity as Secretary of Defense, and Robert M. Gates, the current Secretary, is hereby substituted, pursuant to S. Ct. R. 35.3.

RULE 29.6 NOTICE

All Petitioners are individuals, except for the USFSPA Litigation Support Group, ULSG, LLC, a limited liability corporation created under the laws of Florida, which has no parent entity nor any issued stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the September 18, 2006, judgment and opinion of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Fourth Circuit, of September 18, 2006, *Adkins v. Rumsfeld*, is reported at 464 F.3d 456 (4th Cir. 2006) and is reprinted at App. 1a. The Fourth Circuit's denial of panel rehearing and rehearing en banc was issued on November 14, 2006, and is reprinted at App. 29a.

The Fourth Circuit opinion was issued in response to an appeal of a number of orders issued by the U.S. District Court for the Eastern District of Virginia, namely those of (a) October 13, 2005, reprinted at App. 31a; (b) March 16, 2005, reprinted at App. 41a; and (c) October 12, 2004, reprinted at App. 65a, and reported at 370 F. Supp.2d 426 (E.D. Va. 2004).

STATEMENT OF JURISDICTION

Petitioners seek review from the opinion and judgment of the U.S. Court of Appeals for the Fourth Circuit of September 18, 2006. The Fourth Circuit denied a petition for rehearing on November 14, 2006. App. 29a. The U.S. Supreme Court has jurisdiction to review cases from federal courts of appeals by virtue of 28 U.S.C. § 1254(1) (2000).

STATUTORY PROVISION INVOLVED

As acknowledged by the court of appeals below, see App. 2a, this case implicates the constitutionality of the Uniformed Services Former Spouses' Protection Act ("USFSPA"), Pub. L. No. 97-252, 96 Stat. 730 (1982), currently codified as amended at 10 U.S.C. § 1408. This statute, in all relevant respects for this petition, is reprinted at App. 79a.

STATEMENT

1. a. In exercise of its powers under the Constitution, U.S. CONST. art. I, § 8, cls.12 (Raise and Support Armies Clause) & 14 (Regulation of Armed Forces Clause), Congress has prescribed a wide array of benefits to the men and women who have served with honor in the United States armed forces. Among these benefits are the retired and retention pay that is rendered to enlisted personnel and officers who serve a statutorily-prescribed period of time on active duty (typically 20 years), and (although retired) are still obliged to comport themselves in accordance with the Uniformed Code of Military Justice (UCMJ) and are subject to recall for active duty. See 10 U.S.C. §§ 688, 802(a)(4), 1401 et seq. See also App. 3a.

The legal characterization and status of military retired pay has been a subject requiring this Court's attention for over a century. See, e.g., *United States v. Tyler*, 105 U.S. 244 (1881) (computation of retired pay); *Plumer v. United States*, 224 U.S. 137 (1912) (same); *Barker v. Kansas*, 503 U.S. 594 (1992) (review granted as to the question of whether military retired pay was subject to state taxation scheme). Up until the early 1980's it was a matter of some controversy whether military retired pay was even divisible as a marital asset in divorce proceedings involving a former member of the armed forces. By the early 1980's, a handful of jurisdictions (11 states in

number), permitted a veterans' military retired pay to be divided with a former spouse.[1] In a 1981 decision, this Court in *McCarty v. McCarty*, 453 U.S. 210 (1981), ruled that federal law precluded state courts from dividing military retired pay pursuant to state community property laws. See id. at 235.

b. In response to *McCarty*, Congress legislated in 1982 the Uniformed Services Former Spouses' Protection Act (USFSPA), codified at 10 U.S.C. § 1408. For the purposes of the present petition, the crucial provisions of USFSPA concern Congress's grant to divorce courts of the authority to treat retired pay as property "solely of the [service] member or as property of the member and his spouse in accordance with the law of the jurisdiction. . . ." Id. § 1408(c)(1); App. 82a. USFSPA thus permitted states to treat military retired pay as divisible property, without any federal preemptive effect, should state community property or divorce settlement laws so prescribe. USFSPA does require that a state court have proper personal jurisdiction over a former servicemember by way of residence (other than by military posting), domicile, or consent. See id. § 1408(c)(4); App. 83a.

In any event, USFSPA designates "disposable retired pay," that is subject to division with a former spouse. Among the amounts required to be deducted from total retired pay, in order to calculate disposable retired pay, are any amounts that

[1] According to the Department of Defense's own study contained in a report to Congress, see A Report to Congress Concerning Former Spouse Protection Laws, at 4, 58, 71; App. C (Sept. 4, 2001) ["DoD 2001 Report"], available at http://www.dod.mil/prhome/spouserev.html, prepared in accordance with the National Defense Authorization Act, FY 1998, § 643, Pub. L. No. 105-85, 111 Stat. 1629 (1997), most of these eleven jurisdictions were traditional community property states.

a veteran was obliged to waive as a condition of receiving disability compensation. See id. § 1408(a)(4)(B); App. 80a; see also *Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989) (holding that state courts may not treat veterans' disability benefits as disposable military retired pay for purposes of a division with a former spouse).

A feature of USFSPA was an automatic payment procedure by which former spouses could directly receive court-ordered increments or shares of a veteran's retired pay, garnished by the government, provided that certain statutory requisites were satisfied by the former spouse (including having been married to the veteran for at least 10 years). See id. § 1408(d); App. 83a. In addition, Congress imposed a percentage cap on amounts of a veteran's retired pay that could be directly remitted under this scheme. See id. § 1408(e)(1); App. 86a. However, USFSPA allowed the Department of Defense to garnish veterans' retired pay merely upon the presentation (by a former spouse) of a state court order that appeared "regular on its face," id. §§ 1408(b)(2) (definition); 1408(d); 1408(e)(5); 1408(f)(1); App. 82a, 83a-86a, 89a, with only cursory notice being given to the veteran, id. § 1408(g); App. 90a, without a procedure to challenge wrongful garnishments, to claim refunds for amounts improperly paid to former spouses, id. § 1408(e)(3); App. 87a, or to protect the rights of active-duty members under the Servicemembers Civil Relief Act (SCRA), 50 App. U.S.C. § 501 et seq. See 10 U.S.C. § 1408(b)(1)(D); App. 82a.

Respondent Secretary has issued regulations, pursuant to USFSPA section 1408(j); App. 90a, which are now contained in volume 7B, chapter 29 of the Department of Defense's Financial Management Regulations (DODFMR), DOD 7000.14-R (July 2005), see http://www.dod.mil/comptroller/fmr/07b/07b_29.pdf. The Secretary of Defense has delegated his functions under USFSPA to the Defense Finance and Accounting Service

(DFAS). Under the DODFMR, as long as a state court order appears "regular on its face," DFAS will not further review the matter to determine whether that court had proper personal jurisdiction over the military retiree, within the meaning of USFSPA section 1408(c)(4); App. 83a, or ensure that the other protections of USFSPA have been observed. See DODFMR ¶291003; see also App. 6a-7a.

c. Since USFSPA was legislated, substantial disparities have arisen as to the application of a number of its provisions relative to veterans resident in different states or divorce court jurisdictions. Taken together, this lack of regularity in the application of USFSPA has clearly been contrary to Congress's professed intent to create a uniform set of rules for the distribution of veterans' retired pay.

The main areas of discord among state courts in interpreting USFSPA have been (a) applying USFSPA section 1408(c)(4)'s, App. 83a, requirements of personal jurisdiction over the veteran, compare *Gowins v. Gowins*, 466 So.2d 32 (La. 1985), with *Flora v. Flora*, 603 A.2d 723 (R.I. 1992); (b) respecting USFSPA section 1408(e)'s, App. 86a, 50% cap on disbursements of the servicemember's disposable income to a former spouse, compare *Cline v. Cline*, 90 P.3d 147 (Alaska 2004), with *Coon v. Coon*, 614 S.E.2d 616 (S.C. 2005); (c) whether retirement pay should be calculated, under USFSPA section 1408(c)(1), App. 82a, as of the date of divorce and not the date of retirement (if subsequent to the divorce), compare *Rhodes v. Rhodes*, 708 So. 2d 1240 (La. 1998), with *Balderson v. Balderson*, 896 P.2d 956 (Idaho 1995); and, finally, (d) whether, under USFSPA section 1408(a)(4)(B), App. 81a, veterans' disability pay can be treated as "disposable military retired pay," compare *Shelton v. Shelton*, 78 P.3d 507 (Nev. 2003), with *Ex parte Billieck*, 777 So. 2d 105 (Ala. 2000).

d. In order to appreciate the significance of USFSPA's impact on the personal and professional lives of America's citizen-warriors, it is important to keep some statistics in mind. According to Respondent Secretary's 2001 Report to Congress, as of April 1999, there were 1,985,557 former servicemembers receiving retired pay. DoD 2001 Report, supra note 1, at 19. The aggregate number of veterans receiving (or eligible for) military retired pay is believed to have grown in the interim to over 2.1 million, and will continue to increase given such factors as changes in military recruitment and retention policies (including increases to our armed forces due to the war on terrorism) and the general health and longevity of America's population. Nearly 5% of all veterans receiving retired pay are women, and this percentage, too is expected to grow. Given that military families share general features with that of American society-at-large, it can be safely assumed that at least half of all those eligible to receive military retired pay have had, or will have, at least one marriage terminated by divorce. Even adjusting for the fact that some servicemembers may never marry, that leaves nearly one million individuals who will be affected by the provisions of USFSPA sometime during their lifetime.

Additionally, Respondent Secretary has reported that, again as of April 1999, nearly 55,000 former spouses receive a direct payment of a veterans' retired pay, via a garnishment executed by DFAS. See id. Once again, these numbers are believed to have increased since 1999, and, in any event, do not accurately account for all former spouses who receive payments under USFSPA, because respondent only directly pays former spouses who have been married at least ten years. This makes for a substantial number of veterans who are affected by the procedural protections afforded by USFSPA in regards to the garnishment of their military retired pay, which may reflect a

substantial portion of their monthly income (especially for those individuals who, because of a late entry into the civilian work-force, may not have a privately-funded pension).

2. a. Plaintiffs' complaint alleged four distinct constitutional defects of USFSPA. The first was that the statute had an impermissible retroactive effect as to those veterans who had entered the armed forces prior to its enactment (or, in some cases, to those who had actually retired and begun to draw retired pay), in violation of the Due Process Clause (the "retroactivity" or substantive due process challenge). The second was that the Act, and regulations issued by Respondent Secretary thereunder, afforded insufficient protections to veterans whose military retired pay was being garnished by former spouses (the procedural due process challenge). The third was that USFSPA, insofar as it was legislated under the Full Faith and Credit and Armed Forces Regulation Clauses, was constitutionally required for its substantive provisions to operate uniformly for veterans in all states, a condition which is manifestly absent in the current application of the Act (the uniformity challenge). Lastly, the Act has impermissibly discriminated against various classes of veterans and non-veterans, and as between male and female servicemembers and their former spouses, in violation of the Equal Protection Clause (the equal protection challenge). Each of these challenges was at issue in the court of appeals, and in this petition.

The fifty-eight individual plaintiffs in this case (seven of whom are women) are all retired veterans of the United States Armed Forces, who have honorably served their country, and who are currently drawing (or are eligible to draw) retirement pay by virtue of their service, or are active duty servicemembers who will be eligible to receive retired pay. App. 7a. Each of the individual plaintiffs is also divorced, and, as part of their divorce decrees or related property settlements, were required to

grant their former spouses a designated portion of their retired pay. See id. Some of the individual plaintiffs had joined the armed forces prior to USFSPA's enactment in 1982 (or had even begun drawing military retired pay before the Act), and were divorced in jurisdictions that had not, prior to USFSPA, allowed for marital division of retired pay.

The association plaintiff – ULSG, LLC – is a voluntary organization of veterans seeking reform of the laws affecting veterans' retired pay. See id. In their amended complaint, see App. 8a, plaintiffs pled further facts in relation to ULSG as an associational entity, and also the characteristics and profiles of its individual members. Aside from specifying more fully the purposes and objectives of ULSG, the amended complaint gave precise information about the financing of the organization through the voluntary contributions of enrolled members. See App. 7a-8a. The amended complaint acknowledged that the vast majority of ULSG's members are individuals "who are divorced military retirees from all the United States Armed Forces who currently are, or will be subject to and are directly affected by, the provisions of the USFSPA by virtue of a divorce court order. . . ." See App. 12a. Some ULSG members had been divorced prior to USFSPA in states which had not, prior to that statute, allowed a marital division of military retired pay.

b. After filing the original complaint, defendant Secretary moved for dismissal on the theory (based on an extended reading of the *Rooker-Feldman* doctrine) that all of the named individual plaintiffs were barred from challenging USFSPA because they all had a previous opportunity to litigate such constitutional issues in state court during the pendency of their original divorce decrees and property settlements. The district court agreed in its October 12, 2004 order, and dismissed the entirety of the case. App. 65a, 69a-78a.

Plaintiffs then sought reconsideration, pointing out to the trial court that its application of *Rooker-Feldman* swept too broadly, and, at a minimum, that the associational plaintiff – ULSG, LLC – should be given leave to amend the complaint and more fully account for its organizational standing. The district court granted leave to amend as to the standing of ULSG, LLC, in its November 22, 2004 order, but upheld its dismissal of the individual plaintiffs' substantive due process (or retroactivity) claim.

Plaintiffs then amended their complaint, and defendant Secretary again moved to dismiss. In its March 16, 2005 order, the district court held that ULSG, LLC, had associational standing to bring the constitutional challenges to USFSPA, with the exception of the substantive due process (retroactivity) attack. App. 44a-48a. Moving to the merits, the trial court held that USFSPA withstood plaintiffs' uniformity and equal protection challenges, App. 54a-63a, but that factual issues remained as to the manner in which the Secretary and Department of Defense had construed and applied USFSPA's limited procedural due process protections to veterans, through its regulations and procedures. App. 48a-54a.

After a round of discovery – in which the defendant Secretary divulged only some of the relevant regulations and internal operating procedures for its administration of USFSPA, through its Defense Finance and Accounting Service (DFAS), and provided no data as to common processing errors known to be committed by DFAS – both sides cross-moved for summary judgment. In its October 13, 2005 Order the district court granted summary judgment to the government. The trial court held that ULSG, LLC, had no standing to bring a challenge as to USFSPA's failure to provide a mechanism for refund of amounts retained in cases of conflicting state awards or overpayments to former spouses. App. 35a-36a. Otherwise, the

district court held that veterans subject to USFSPA's garnishment procedure for their military retired pay are accorded all the process due to them. App. 35a-40a.

c. On appeal, the Fourth Circuit upheld the constitutionality of USFSPA, and affirmed the district court, but on premises at variance with those articulated by the trial court. The court of appeals first rejected the district court's dismissal of the individual plaintiffs' complaint on *Rooker-Feldman* grounds. The court of appeals held, over a dissenting opinion, App. 27a-28a, that this Court's rulings in *Exxon-Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); and *Lance v. Dennis*, 546 U.S. 459 (2006), narrowed the scope of the *Rooker-Feldman* bar to federal jurisdiction, and that plaintiffs' constitutional claims were not only cognizable by the federal courts, but that the individual and associational plaintiffs generally had standing to raise them. App. 9a-12a.

On the retroactivity challenge of USFSPA, the Fourth Circuit held that it could not be maintained in this case, owing to the changing nature of military retired pay during the period just before, and just after, this Court's 1981 decision in *McCarty*. App. 15a. Distinguishing this Court's ruling in *United States v. Larionoff*, 431 U.S. 864 (1977), the panel ruled that active-duty servicemembers or veterans could have had no settled expectations in receiving an interest in their military retired pay, unencumbered by the claims of former spouses, at the time of USFSPA's passage. App. 13a-15a. Alternatively, none of the individual plaintiffs was appropriately situated to make a retroactivity challenge to USFSPA, although the court of appeals implicitly held that ULSG (the associational plaintiff) might, but to no avail, given the court's ruling as to the character of military retired pay. App. 15a.

As for the uniformity challenge, the Fourth Circuit held

that even if USFSPA had been legislated under the Full Faith and Credit Clause of the Constitution, such did not convey a requirement that Congress legislate uniformly under that provision. App. 16a (citing U.S. CONST., art. IV, § 1 (Congress "may by *general Laws* prescribe the Manner in which [state public] Acts, Records and Proceedings shall be proved, and the Effect thereof" (emphasis added)). As for Congress's exercise of power under the Armed Forces Regulation Clause in legislating USFSPA, the court of appeals held that it should defer to an ostensible congressional determination that "military retiree pay [have] no special exemption from ordinary state divorce law," relying on this Court's opinion in *Rumsfeld v. Forum for Academic & Institutional Rights*, 126 S. Ct. 1297 (2006). App. 16a-17a. The Fourth Circuit thus denied the premise of the uniformity challenge – that Congress was under a constitutional mandate, in legislating USFSPA, to have its substantive provisions apply uniformly to veterans in all states.

In addressing the equal protection challenge, the court of appeals acknowledged that while USFSPA is gender-neutral on its face, and thus this Court's test in *Pers. Adm'r of Mass v. Feeney*, 442 U.S. 256, 274 (1979), is to be applied, there was conflicting evidence as to whether Congress, in legislating USFSPA, was primarily concerned with the plight of servicemember wives, without regard to the possibility that women may someday (as today) comprise nearly 17% of the armed forces and 5% of the cadre of veterans receiving retired pay. App. 18a. The Fourth Circuit nevertheless held that there was no "gender-based discriminatory purpose" reflected in USFSPA's enactment, and thus the statute would be reviewed under rational-basis scrutiny, even though the statute concerns marriage, which is a fundamental constitutional right. App. 19a. And, in response to a position not even pressed by the Secretary, the court of appeals ruled that insofar as military retired pay was

to be characterized as a pension (without any future service obligation), Congress was at liberty to allow former spouses to collect a share of retired pay, even though they were under no obligation to return to active duty or comport themselves under the UCMJ. App. 20a-21a (discussing *Barker v. Kansas*, 503 U.S. 594 (1992)).

Finally, in relation to the procedural due process challenge, the Fourth Circuit held that veterans certainly do have a property interest in the receipt of their retired pay and such could be deprived by garnishments allowed under USFSPA, and the DOD regulations issued thereunder. App. 23a. But, the court of appeals held, as viewed either under this Court's decision in *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285, 288-89 (1924), or *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), veterans are afforded the "minimum measure of procedural protection warranted under the circumstances" by Defendant Secretary and DFAS. App. 23a-24a (quoting *Mallette v. Arlington County Employees' Supp. Ret. Sys. II*, 91 F.3d 630, 634 (4th Cir. 1996)). And while the court of appeals noted that "[r]etirement pay is a significant asset, so the private interest is not trivial," under the *Mathews* factors, it "is not so weighty as to eclipse the others." App. 25a. The Fourth Circuit concluded that while USFSPA allows DFAS to garnish veterans' retired pay under state court orders that only facially appear to comply with jurisdictional and procedural safeguards for former servicemembers, any further protections would simply be too much trouble for DFAS, "without demonstrably reducing the error rate of the existing enforcement system." App. 27a.

d. The court of appeals thus denied each of the constitutional challenges made to USFSPA. After a petition for panel and en banc rehearing was denied on November 14, 2006, App. 29a, this timely petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This petition raises significant issues as to the legal nature and character of military retired pay – a form of compensation earned by over two million American veterans – and the modalities of its divisibility as a marital asset. The underlying case challenged the constitutionality of the Uniformed Services Former Spouses' Protection Act (USFSPA), Pub. L. No. 97-252, 96 Stat. 730 (1982), currently codified as amended at 10 U.S.C. § 1408, in four main respects: (1) that USFSPA's provision, id. § 1408(c)(1); App. 82a, allowing for the division of military retired pay to the benefit of former spouses cannot be retroactively applied to those individuals who entered the armed forces prior to its enactment; (2) that USFSPA violates the Equal Protection Clause insofar as it impermissibly discriminates against retirees of the armed forces; (3) that USFSPA's mechanism for the garnishment of military retired pay, id. §§ 1408(d), (e) & (f); App. 83a-90a, affords insufficient procedural due process in the deprivation of such a significant property right; and (4) that because USFSPA was legislated under the Full Faith and Credit and Armed Forces Regulation Clauses, its many provisions which allow for divergent treatment of divorced armed forces retirees resident in the several states are unconstitutional because they do not require uniform application.

In denying these constitutional challenges – especially those on substantive due process (retroactivity) and equal protection grounds – the court of appeals enunciated a characterization of military retired pay which was not only internally contradictory, but, more significantly, at sharp variance with the rulings of this Court in *United States v. Larionoff*, 431 U.S. 864 (1977); *McCarty v. McCarty*, 453 U.S.

210 (1981); and *Barker v. Kansas*, 503 U.S. 594 (1992). This Court's review is necessitated to confirm that military retired pay is compensation for future services to be rendered to our armed forces (including being subject to military discipline and recall for active duty). The continuing and personal character of these services means that Congress could not have made retired pay divisible as a marital asset for those individuals already in the armed forces at USFSPA's passage (and certainly not for those veterans already drawing retired pay prior to the Act), and cannot, consistent with the Equal Protection Clause, grant the former spouses of veterans an interest in the receipt of retired pay greater than the former servicemember herself, and without any of the requirements of continuing service to our nation.

Additionally, in turning aside the procedural due process protest to USFSPA's garnishment mechanism, the Fourth Circuit subverted the controlling standard articulated by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and ostensibly ruled in tension with a decision of at least one other circuit. Finally, in rejecting the uniformity objection to USFSPA, the Fourth Circuit improperly applied this Court's prior opinions in framing the scope of Congress's power under the Armed Forces Regulation Clause, and utterly ignored the uniformity command of the Full Faith and Credit Clause's requirement that Congress act by "general Laws" to prescribe the "Effect" of state court judgments (in this case, marital property divisions).

A. Review is Necessitated to Conclusively Clarify the Character of Military Retired Pay as a Personal Asset, in the Face of Retroactivity and Equal Protection Challenges to USFSPA.

1. Since military retired pay was instituted during the

Civil War as an essential instrument for the recruitment, retention, and retirement of personnel in the nation's armed forces, this Court has been obliged to determine its legal nature in the face of a variety of circumstances. See, e.g., *United States v. Tyler*, 105 U.S. 244 (1881) (computation); *McCarty v. McCarty*, 453 U.S. 210 (1981) (retired pay as not a form of marital property); *Mansell v. Mansell*, 490 U.S. 581 (1989) (retired pay, as distinct from disability pay); *Barker v. Kansas*, 503 U.S. 594 (1992) (military pay not subject to state taxation as a pension); see also Cong. Res. Serv., *Military Benefits for Former Spouses: Legislation and Policy Issues*, at 9 (2004).

This petition calls upon the Court to examine a complex of questions left open in its 1981 *McCarty* and 1992 *Barker* decisions, as well as other opinions concerning the expectation interests of servicemembers and veterans in the receipt of certain forms of compensation. See *United States v. Larionoff*, 431 U.S. 864 (1977). The court of appeals essentially held, for purposes of both petitioners' substantive due process (retroactivity) and equal protection protests to USFSPA, that veterans (at least prior to the statute) had no expectation of an unencumbered interest in their military retired pay, even though it was a form of pension benefit and not for future, personal services to be owed for national defense. See App. 14a-15a, 20a-21a. Aside from being internally inconsistent in its treatment of the retired pay, the court of appeals' decision profoundly misunderstood this Court's jurisprudence on the character of military retired pay in the context of veterans' expectations as to its receipt, free of claims by former spouses.

2. a. The nub of the panel's decision allowing USFSPA's retroactive denial of unencumbered military retired pay to veterans was its conclusion that

> The individual plaintiffs here, however, cannot

> plausibly allege that at the time they joined the military[,] Congress promised to permanently shield their retirement pay from former spouses presenting valid state court orders. Only the Supreme Court's decision in *McCarty* – not any promise by Congress – could arguably have supported the expectations of some service members that their retirement pay would be shielded in this manner.

App. 15a. The legal assumption made by the court of appeals was that when this Court held in *McCarty* that states could not, in view of then-existing federal legislation, divide a veteran's military retired pay with a former spouse, 453 U.S. at 233-35, that that was, in fact, the norm in most (or all) states. Rather, only eleven states permitted such a division.[2] Even prior to *McCarty*, those serving in the military would have had a reasonable expectation that their military retired pay was not subject to division with a former spouse, unless the veteran was legally resident in the handful of states that recognized community property principles.

Essential to the court of appeals' decision was its

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[2] See Appendix C of the of the 2001 DoD Report, supra note 1, which was prepared for the DoD and Congress by the Army Judge Advocates General (JAG) School, and contains a state-by-state analysis of when jurisdictions, either by statute or operation of common law, allowed for the division of military retired pay as a marital asset upon divorce. As of the adoption of USFSPA, in September 1982, only 11 of 52 jurisdictions had done so (Arizona, California, Hawaii, Idaho, Louisiana, Michigan, Montana, New Jersey, New Mexico, Oregon, and Washington), most of which were traditional community property states. See http://www.dod.mil/prhome/docs/finalc.pdf. It is clear that USFSPA – and not some pre-existing case law – unsettled the expectations of military retirees in this respect.

distinction of this Court's ruling in *United States v. Larionoff*. See App. 13a-15a. *Larionoff* concerned Congress's retroactive cancellation of re-enlistment bonuses or ("VRBs"). See 431 U.S. at 865-69. In holding that Congress did not employ the explicit language required to effectuate such a retroactive cancellation of a benefit, this Court noted that

> unless Congress intended, in repealing the VRB program in 1974, to divest Johnson of the rights he had already earned, *and constitutionally could do so*, the prospective repeal of the program could not affect his right to receive a VRB, even though the date on which the bonus was to be paid had not yet arrived.
>
> Of course, if Congress had such an intent, serious constitutional questions would be presented. No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn. . . . *It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing.* In that case, the congressional action would appear in a different constitutional light. Cf. *Lynch v. United States*, 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935).

Id. at 879 (emphasis added; some citations omitted).

It was thus not accurate, as the Fourth Circuit implied, App. 14a, that *Larionoff* stands merely for a "clear statement" rule for retroactive congressional cancellation of military benefits. Even if USFSPA satisfies such a clear statement for

retroactive effect, that still leaves the issue of whether Congress is free, even when it explicitly chooses to so act, to retroactively deprive a veteran of an established benefit (such as an unencumbered right to retired pay). This Court's citations, in *Larionoff*, to *Lynch v. United States*, 292 U.S. 571 (1934); and *Perry v. United States*, 294 U.S. 330 (1935), are significant in this respect. In both these decisions, this Court invalidated acts of Congress which purportedly sought to retroactively cancel some form of military-related benefit. Moreover, this Court had ruled in *Wissner v. Wissner*, 338 U.S. 655 (1950), long prior to *McCarty*, that National Service Life Insurance proceeds for servicemembers and veterans were not subject to division as community property under state law.

It is clear that, under *Larionoff* (decided in 1977), members of the U.S. armed forces prior to USFSPA's enactment (on September 8, 1982; made retroactive to June 25, 1981) would have had "settled expectations," App. 14a (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)), to receive an unencumbered interest in their military retired pay, irrespective of state court orders to divide it with a former spouse, *unless* that servicemember or veteran was domiciled in one of the eleven jurisdictions that had previously recognized such divisions. See *In re Marriage of Giroux*, 704 P.2d 160,162-63 (Wash. 1985) (Washington as one of those states).

b. Compounding the court of appeals' confusion as to the receipt of retired pay as a "settled expectation[]" under this Court's retroactivity jurisprudence, was its ruling in regard to petitioner's equal protection challenge. Even if rational basis scrutiny is applied to the balance of petitioners' equal protection challenges,[3] the panel erred in its characterization of military

[3] The court of appeals ruled that petitioners could not make-out any (continued...)

retired pay, App. 3a-5a, 20a-21a, which was crucial in reaching its conclusion that Congress was free to allow former spouses of servicemembers to receive retired pay (as a divorce settlement) without any restrictions, even while veterans are under a continuing obligation of service and military discipline (as the court below acknowledged, see App. 3a (citing 10 U.S.C. §§ 688, 802(a)(4)). Ostensibly relying on this Court's decision in *Barker*, 503 U.S. at 599, 603, the court of appeals held that military retired pay is to be treated like a traditional pension, as "'deferred compensation for past services'" and not "'compensation for reduced current services' that the service member performs after retirement." App. 21a (quoting *Barker*, 503 U.S. at 603). The panel misapplied *Barker* and mischaracterized retired pay.[4]

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[3](...continued)
heightened scrutiny for a facially gender-neutral statute such as USFSPA, because the legislative record was ambivalent as to whether the statute was intended to benefit former wives at the expense of male veterans. App. 18a-19a. This misapplies the standard announced by this Court in *Pers. Adm'r of Mass v. Feeney*, 442 U.S. 256, 274 (1979), and ignored the prevalence of gender stereotypes in the legislative process, namely, that in 1982 it was assumed by Congress that virtually all veterans receiving retired pay were men, and their former spouses were women.

Additionally, the court of appeals ignored the point that in legislating USFSPA, Congress was discriminating against veterans (both male and female) in the disposition of retired pay, and burdening the exercise of a fundamental right to marry and divorce. See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *United States v. Kras*, 409 U.S. 434, 444-45 (1973); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971).

[4] The panel's conclusion on the status of military retired pay was not even one urged by Respondent Secretary. This is for good reason, since an earlier Department of Defense Report to Congress was unequivocal that military retired pay is not to be regarded as a traditional pension. (continued...)

Barker dealt exclusively with military retired pay for purposes of intergovernmental tax immunity, under 4 U.S.C. § 111, and Kansas's taxation of that pay as ordinary income. See 503 U.S. at 596. This Court held that the retired pay of veterans was not subject to tax under Kansas's scheme. See id. at 605. This Court's discussion in *Barker* appeared to distinguish the treatment of military retired pay for intergovernmental tax immunity purposes, as distinct from its treatment as marital property (the issue in this case). See id. at 600-03 (discussing earlier decisions in *McCarty* and *United States v. Tyler*, 105 U.S. 244 (1882)). *Barker*'s characterization of military retired pay for tax purposes is simply irrelevant in this case, as a number of federal and state courts have held. See *Loeh v. United States*, 55 Fed. Cl. 2, 5 n.5 (2002); *Cooper v. Commissioner of Revenue*, 658 N.E.2d 963 (Mass. 1995).

There is thus a major logical flaw in the court of appeals' decision. If military retired pay is, indeed, deferred

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[4](...continued)

See DOD Report, supra note 1, at 71 ("The military retirement system, however, is unlike any private sector retirement plan. The member makes no contribution to the plan, the member has no vested interest in the plan until he or she becomes eligible to retire, and, even after becoming eligible to retire, the member can be divested of retired pay through punitive action based on the member's misconduct. Even after retiring, the member can be recalled to active duty, can forfeit retired pay because of misconduct, and face certain post-retirement employment restrictions."). See also Statement of James F. Hinchman, General Counsel, General Accounting Office, before the Senate Committee on the Judiciary, *Legal Issues Raised by the Termination of Oliver North's Retirement Pay*, 101st Cong., Sess. 1, at 74 (Oct. 18, 1989) ("over one hundred years of legal precedent teaches us that retired regular officers continue to hold an office in their service. They receive not a pension, but reduced pay in return for current reduced responsibilities and obligations, including possible recall to active duty.").

compensation for work already performed, then the calculus shifts radically in petitioners' favor on their retroactivity challenges. As this Court noted in *Larionoff*, "It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the congressional action would appear in a different constitutional light." 431 U.S. at 879. Retired pay cannot be deferred compensation in order to defeat petitioners' key equal protection challenge, and also be characterized as something less than a "settled expectation" in order to repel their substantive and procedural due process attacks.

3. The dramatic tension between this Court's rulings in *McCarty* and *Barker*, arises from their reading of the earlier opinion in *Tyler* and their characterization of military retired pay as either pay for continuing military service, see *McCarty*, 453 U.S. at 222 n.5, or as deferred compensation for service already completed, see *Barker*, 503 U.S. at 601-03. In *McCarty*, this Court left open the question of whether Congress could constitutionally alter retroactively the allocation of military retired pay under *Larionoff*. See 453 U.S. at 222 n.5.

But to the extent that this Court's ruling in *Barker* subverted the authority of *Tyler*, and recharacterized military retired pay as more like a pension for service already performed, that brings into sharp focus the constitutionality of USFSPA in this respect. This divergent treatment of military retired pay – depending on whether one follows this Court's older decision in *Tyler* (as construed in *McCarty*), or this Court's most recent ruling in *Barker* – has been noted by lower courts. See *United States v. Tafoya*, 803 F.2d 140, 142 (5th Cir. 1986) (*McCarty* cited to reject offset of retired pay); *United States v. Overton*, 24 M.J. 309, 311 (C.M.A. 1987) (*McCarty* invoked to allow court martial of former servicemember receiving retired pay); *Fern v. United States*, 908 F.2d 955, 958-59 (Fed. Cir. 1990) (applying

McCarty to reject retroactivity challenge of USFSPA); *In re Moorhous*, 108 F.3d 51, 54 (4th Cir. 1997) (applying *Barker* to invalidate assignment of retired pay). This Court's review is required to finally settle the status of military retired pay as a marital asset.

B. This Court's Review is Required To Establish the Appropriate Process Due Under Federal Garnishment Schemes.

1. While the court of appeals appeared to assume that veterans have a cognizable property interest in the receipt of their retired pay, and that the garnishment mechanism of USFSPA, 10 U.S.C. §§ 1408(d), (e) & (f); App. 83a-90a, constitutes a deprivation of that property interest, see App. 23a, it nonetheless held that former servicemembers received all the process they were due under the Act. This was despite that USFSPA allows respondent Secretary to garnish veterans' retired pay merely upon the presentation (by a former spouse) of a state court order that appears "regular on its face," id. §§ 1408(b)(2); 1408(d); 1408(e)(5); 1408(f)(1); App. 82a, 83a-86a, 89a, without a procedure to challenge wrongful garnishments, to claim refunds for amounts improperly paid to former spouses, id. § 1408(e)(3); App. 87a, or to protect the rights of active-duty members under the Servicemembers Civil Relief Act (SCRA), 50 App. U.S.C. § 501 et seq. See 10 U.S.C. § 1408(b)(1)(D); App. 82a. See App. 24a-27a. The court of appeals essentially placed the evidentiary burden on the party making the procedural due process challenge to establish, by "empirical evidence that the payments mechanism does not work *in practice*," or be reduced to make a facial attack on the statutory and regulatory garnishment scheme in which it will be assumed that the risk of erroneous deprivations of property are

"minimal." App. 26a (original emphasis).

2. The Fourth Circuit's ruling was premised on a fatal, methodological mis-step, one that has drawn the attention of lower federal courts and requires resolution by this Court. It appears that the court of appeals' ruling was based, at least to some degree, see App. 23a-25a,on this Court's decision in *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924), holding that in a garnishment proceeding all process that is due under the federal constitution is provided in the underlying action establishing the original debt. See id. at 288-89. While the court below was not required to decide whether petitioners' "claim is properly assessed through a direct application of *Endicott-Johnson* or through the *Mathews* balancing test," App. 24a, the panel did hold that "*Endicott-Johnson* suggests that service members who dispute the state court's allocation of retired pay to their former spouses must present their legal or factual arguments to the state courts." App. 24a-25a.

But, as the court below itself acknowledged, it is by no means clear that *Endicott-Johnson* remains good law. See App. 24a (citing sources). Indeed, seven federal courts of appeals have either expressly indicated that *Endicott-Johnson*'s categorical denial of due process in subsequent garnishment proceedings was overruled by *Mathews*, or have intimated that its precedential value is dubious. See, e.g., *Aacen v. San Juan County Sheriffs Department*, 944 F.2d 691, 695 (10th Cir. 1991); *Dionne v. Bouley*, 757 F.2d 1344 (1st Cir. 1985); *Duranceau v. Wallace*, 743 F.2d 709 (9th Cir. 1984); *Nelson v. Regan*, 731 F.2d 105 (2d Cir. 1984); *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir.1980) (en banc); *Brown v. Liberty Loan Corp.*, 539 F.2d 1355 (5th Cir. 1976); *Reigh v. Schleigh*, 784 F.2d 1191, 1194 (4th Cir. 1986). Moreover, this Court in both *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 601, 605-06

(1975); and *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 337 & n.1 (1969), involving situations where there had been some prior state court judicial process, nevertheless insisted on additional procedural due process protections for garnishments.

Although the court of appeals proceeded to also apply the *Mathews* balancing factors, its discussion of *Endicott-Johnson* was crucial for its holding that "[r]etirement pay is a significant asset, so the private interest is nor trivial, but neither is it so weighty as to eclipse the other [*Mathews*] factors." App. 25a. The Fourth Circuit's ruling, requiring "empirical evidence" of systematic errors in a garnishment process leading to deprivations of property, App. 26a,[5] presumes that there have been earlier opportunities for a garnishee to challenge the underlying obligation. That was *Endicott-Johnson*'s holding, and precisely the result that has been disavowed by many other courts of appeals to consider this question.

3. Without citing the decision, the court below may have been influenced by this Court in *United States v. Morton*, 467 U.S. 822 (1984), considering procedural due process protections in the context of the federal garnishment statute, 42 U.S.C. § 659. But that statute (unlike USFSPA, at issue here)

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[5] Ironically, the court of appeals ignored empiric evidence of DFAS's errors in processing garnishment orders, evidence provided by the Department of Defense's Inspector General. See *Financial Management: Military Retirement Fund Processes Related to Deceased Retirees' Accounts* (D-2005-007) (Oct. 25, 2004); available at http://www.dodig.mil/Audit/reports/FY05/05007sum.htm ("Systemic control weaknesses led DFAS to improperly pay military retirement benefits of about $4.8 million per month to the accounts of as many as 3,100 deceased retirees. . . ."); *Financial Management: Military Retirement Fund Processes Related to Deceased Former Military Spouses* (D-2006-098) (July 17, 2006); at http://www.dodig.mil/Audit/reports/FY06/06098sum.htm.

does provide pre- and post-deprivation protections for a garnishee. In *Simanonok v. Simanonok*, 787 F.2d 1517 (11th Cir. 1986), the Eleventh Circuit – for purposes of reversing a district court's dismissal of a procedural due process challenge of USFSPA – held that "it is not clear that the Act and its accompanying regulations provide individuals in Simanonok's position with all the process due them." Id. at 1522. Distinguishing the statute at issue in *Morton*, the Eleventh Circuit ruled that the unavailability of basic procedural safeguards in USFSPA – no opportunity to be heard, enforcement of state court orders merely appearing "regular on [their] face," and no refund mechanism for amounts improperly garnished or withheld – raised serious questions about USFSPA's constitutionality in this respect. See id. at 1523.

The Fourth Circuit's procedural due process ruling, aside from applying a flawed standard based on this Court's jurisprudence, is in substantial tension with the decisions of at least one other federal court of appeals.

C. Petitioners' Uniformity Challenge of USFSPA was Improperly Rejected Based on a Misreading of this Court's Armed Forces Regulation Clause and Full Faith and Credit Clause Jurisprudence.

1. The court of appeals held that although USFSPA was legislated pursuant to Congress's powers to regulate the armed forces, U.S. CONST. Art. I, § 8, cls. 12-14, such did not impose a duty on Congress to legislate uniformly in respect to former servicemembers residing in the several states. The panel relied on the notion that courts owed Congress substantial deference when legislating in this area. See App. 16a-17a. But, in the decision ostensibly relied upon by the Fourth Circuit, this Court noted:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, see *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281 (1866); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919), but the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice.

Rostker v. Goldberg, 453 U.S. 57, 67-68 (1981). "[D]eference does not mean abdication. . . ." Id. at 70.

Left unremarked by the lower court were other Supreme Court decisions in which a requirement of uniformity has been imposed against legislation adopted under the Armed Forces Clauses. See *United States v. Shearer*, 473 U.S. 52, 88 n.4 (1985) ("it would be anomalous for the Government's duty to supervise servicemen to depend on the local law of the various states."); *United States v. Standard Oil Co.*, 332 U.S. 301, 305-07 (1947); see also *United States v. Johnson*, 481 U.S. 681, 695 (1987) (Scalia, J., dissenting) ("Congress could not have intended local, and therefore geographically diverse, tort law to control important aspects of the 'distinctively federal' relationship between the United States and enlisted personnel."). Moreover, in *McCarty*, this Court was adamant that state-by-state variations in the treatment of military retired pay was constitutionally unacceptable. See 453 U.S. at 232.

2. The court of appeals also erred in its holding that

USFSPA was not legislated under the Full Faith and Credit Clause, and that, even if it had been, "the clause does not impose on Congress any requirement of substantive uniformity in any area of law." App. 16a.

USFSPA's provisions granting recognition and enforcement of state court property settlements following divorce, see 10 U.S.C. §§ 1408(a)(1) - (3), 1408(b), 1408(c), 1408(d); App. 79a,-80a, 81a-86a, were clearly intended to give a form of full faith and credit to state court property settlements involving military retired pay and to enforce them through not only a federal mechanism (the garnishment of retired pay), but also through a requirement of recognition by other state courts. As such, these provisions of USFSPA were legislated pursuant to Congress' powers under the Full Faith and Credit Clause of Article IV of the Constitution. Although the Clause was not specifically invoked in the statutory text or legislative history, Congress's interest was in enforcing state court judgments and to ensure against inappropriate forum shopping. See S. Rep. 97-502, 1982 U.S.C.C.A.N. 1596, 1603-04 (committee report), 1630-31 (statement by Lawrence Korb, Ass't Sec. of Defense); see also *Simanonok*, 787 F.2d at 1522 (noting connection between USFSPA and full faith and credit principles).

Congress's powers in acting under the Full Faith and Credit Clause are not unlimited, and are subject to a textual stricture found only in a handful of other provisions in the Constitution. In acting under this provision, Congress is required to legislate through "general Laws," U.S. CONST. Art. IV, § 1, which must have uniform effect throughout the nation. See *McElmoyle, for Use of Bailey v. Cohen*, 38 U.S. (13 Pet.) 312 (1839); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813). The requirement of general, uniform legislation has been recognized by this Court as a limit on Congress's power to legislate under the Full Faith and Credit Clause. See *Sherrer v.*

Sherrer, 334 U.S. 343, 352 & n.18 (1948). Indeed, this Court has said that "the Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections," *Estin v. Estin*, 334 U.S. 541, 545-46 (1948), but, rather, in a uniform fashion in a way consistent with the Framers' purpose of unifying the nation by making it easier to enforce state court judgments and orders across state lines. See id., see also *Hughes v. Fetter*, 341 U.S. 609, 612 & n.9 (1951) (describing the "strong unifying principle embodied in the Full Faith and Credit Clause").

3. The panel erred in rejecting petitioners' challenge, even though USFSPA results in non-uniform dispositions of retired pay for veterans domiciled in different states.[6]

D. This Court's Review is Sought to Adjudge the Constitutionality of a Significant Act of Congress, the Provisions of Which Affect Millions of Veterans.

Petitioners candidly acknowledge that there is currently no split in the circuits as to the constitutionality of USFSPA in all the respects presented here. This case was designed to present to a single court, in the exclusive form of a declaratory judgment action, see 370 F. Supp.2d at 428, a comprehensive

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[6] The example cited by the panel, App. 16a, is amongst the most egregious of these situations, although not for the reasons mentioned. Some state courts routinely award *more* than 50% of a veteran's disposable retired pay, based on different interpretations of USFSPA sections 1408(e)(1) and 1408(e)(6). See *Ex parte Smallwood*, 811 So. 2d 537 (Ala. 2001); *Forney v. Minard*, 849 P.2d 724 (Wyo. 1993) (100% of veterans' retired pay awarded to ex-spouse). See also DOD 2001 Report, supra note 1, at 23. For further examples of the lack of uniformity in the application of essential provisions of USFSPA, see text, supra, at 5.

set of challenges to the statute. Because of the nature of the plaintiff groups (both individuals and the associational plaintiff), the multiple constitutional counts, the relief sought, and the appropriate statutory venue, this action could have only been brought in one federal district (at the situs of the Secretary of Defense), and thus an action of this sort could only be reviewed in one federal court of appeals.

In the wise exercise of its certiorari jurisdiction, this Court has granted review to assess the constitutionality of acts of Congress, even if there has been no evident conflict in lower court authority, and even where the statute has been upheld (in whole or in part) by the court from which review was granted. See, e.g., *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 371 (2000) (constitutionality of federal trade sanctions against Burma in preempting contrary state law); *Miller v. Albright*, 523 U.S. 420, 428 (1998) (constitutionality of a naturalization statute); *United States v. United States Shoe Corp.*, 523 U.S. 360, 365 (1998) (constitutionality of harbor maintenance tax; challenges concentrated in one appeals court).

USFSPA is a disincentive and penalty for anyone who served in the uniformed services who divorces. This petition presents the Court with the opportunity to conclusively determine the character of military retired pay as a continuing form of personal obligation to this nation's security; to assess the contemporary equal protection implications of a statute adopted at a time when there were relatively few women in this nation's armed forces; to establish the contours of procedural due process protections for veterans whose retired pay is being garnished by the government; and to elaborate on Congress's constitutional obligation to legislate uniformly with respect to the compensation and benefits afforded to those who have served this country for so long, and with such distinction.

CONCLUSION

The petition ought to be granted.

Respectfully submitted,

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February 9, 2007

Appendix

United States Court of Appeals,
Fourth Circuit.

Tammy ADKINS; Gerrit J. Allen; Daniel Anderson; William Arnold; Donald O. Austin; Robert M. Balick; Charles A. Barat; Richard A. Becker; Paul A. Brandmire; Ricky L. Brennan, Sr.; Robert D. Buxton; John Capewell; Philip P. Casale, Sr.; William F. Conroy, III; Frederick A. Cook; Ronald L. Deming; William H. Drawbond; Brian D. Dunn; Clifford C. Eckert; Stephanie A. Eeckhout; Sherry E. Fancher; Wendell D. Farris; Richard D. Ferrell; Terry P. Fletcher; Robert Frick; Maurice R. Gagnon; Gregory L. Goins; Steven M. Hanger; Gregory Harris; Jackie D. Hawkins; Brian J. Hendricks; Diane Hobbs; James William Hunter; William Paul Kennemer; William J. Koselka; Roger Ledbetter; James W. Loberg; Kenneth Manring; Stephen Monks; Frederick Nehrings; John B. Noone, Jr.; Edwin E. Ostroot, II; Steven Perrin; Marvin L. Potts; Lorraine C. Reis; Ronald A. Resare; Donald E. Rotunda; Michael Speir; Lloyd E. Stanton, Jr.; Marvin G. Stroud, Jr.; Robert W. Throckmorton; Glenn Udart; Michael Varela; Mickey Wright; Dorothy J. Yarde; George Zamora; Carroll Zimmerman; ULSG, LLC; Bruce Paquette; Arthur Wilson, Plaintiffs-Appellants,

v.

Donald H. RUMSFELD, Defendant-Appellee.

No. 05-2307.

Argued May 22, 2006.
Decided Sept. 18, 2006.

Before WIDENER and MICHAEL, Circuit Judges, and JOSEPH R. GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge MICHAEL wrote the opinion, in which Judge GOODWIN joined. Judge WIDENER wrote a separate concurring opinion.

MICHAEL, Circuit Judge.

The Uniformed Services Former Spouses' Protection Act (Act) gives states the option to classify a United States armed forces member's disposable military retirement pay as property divisible upon divorce. Pub.L. No. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. § 1408). In addition, the Act establishes a payments mechanism allowing an eligible former spouse to receive the share of the retired pay directly from the military pursuant to a state court order in divorce proceedings. *Id.* In this case current and retired members of the armed forces whose retirement pay has been divided in state divorce proceedings, and an association representing such members, sued the Secretary of Defense. The plaintiffs allege that the Act and the regulations implementing it violate their constitutional rights to due process and equal protection of law. They also allege that the Act fails to respect the principle, purportedly rooted in the Constitution's Armed Forces and Full Faith and Credit Clauses, that legislation concerning military pay must have nationally uniform effect without variations among the states. The district court dismissed the individual plaintiffs' claims for lack of subject matter jurisdiction, reasoning that these plaintiffs impermissibly sought appellate review of their

underlying state court divorce decrees. The court later dismissed or granted summary judgment to the Secretary on all of the association's claims. We conclude that the district court correctly rejected the association's constitutional challenges, and we also conclude that the individual claims cannot succeed, even though the district court had subject matter jurisdiction over them. We therefore affirm.

I.

A.

To be eligible for retirement pay, members of the uniformed services must generally serve for a specified length of time, usually at least 20 years. *See* 10 U.S.C. § 3911 *et seq.* (Army); § 6321 *et seq.* (Navy and Marine Corps); § 8911 *et seq.* (Air Force). Members also face a mandatory retirement age of 62 regardless of how long they have served, subject to certain exceptions. 10 U.S.C. § 1251. The amount of retirement pay is usually a product of two factors: the number of years of creditable service and a fixed percentage of the member's "pay level achieved at retirement." *Barker v. Kansas,* 503 U.S. 594, 599, 112 S.Ct. 1619, 118 L.Ed.2d 243 (1992); *see* 10 U.S.C. §§ 1406-07, 1409 (setting forth rules for computation of retirement pay). Federal law may impose obligations on members even after retirement. Many retirees remain members of the Armed Forces. *See, e.g.,* 10 U.S.C. § 3075(a) (Army); § 8075(a) (Air Force). They may in some circumstances be recalled into active duty, *see* 10 U.S.C. § 688, and they may not violate the provisions of the Uniform Code of Military Justice, *see* § 802(a)(4). These obligations, though significant, do not imply that military retirement pay is to be regarded for all legal purposes as compensation for reduced job activities during retirement. In some contexts this pay may instead be viewed as

"deferred compensation for past services," *Barker,* 503 U.S. at 603, 112 S.Ct. 1619, just like ordinary public sector employee pensions. Divorce is one example. *Id.*

The division of spousal property upon divorce is usually a question of state law. "The whole subject of the domestic relations of husband and wife ... belongs to the laws of the States and not to the laws of the United States." *In re Burrus,* 136 U.S. 586, 593-94, 10 S.Ct. 850, 34 L.Ed. 500 (1890). But application of state family law under some narrow circumstances cuts into substantial federal interests and must yield to federal law under the Supremacy Clause. *See Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581-83, 590, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). The Supreme Court identified one of these circumstances in *McCarty v. McCarty,* 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). There the Court found an irreconcilable conflict between the federal statutes governing military retirement pay--which the Court construed as making retirement pay the property of the retiree--and state law that treated pay earned during marriage as divisible spousal property. The Court went on to hold that state law could not be allowed to divide a military retiree's retirement pay in divorce proceedings. *Id.* at 232-33, 101 S.Ct. 2728. That is, the retiree's former spouse could not receive a share of the retiree's retirement pay. Remarking that the "plight of an ex-spouse of a retired service member is often a serious one," the Court emphasized that its determination was subject to legislative correction: "Congress may well decide ... that more protection should be afforded [such] a former spouse.... This decision ... is for Congress alone." *Id.* at 235-36, 101 S.Ct. 2728.

Congress made exactly that decision in passing the Uniformed Services Former Spouses' Protection Act. The statute provides that subject to specified limitations "a court may treat disposable retired pay payable to a member for pay periods

beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse *in accordance with the law of the jurisdiction of such court.*" 10 U.S.C. § 1408(c)(1) (emphasis added). Disposable retired pay is the total monthly retired pay less certain deductions, § 1408(a)(4), and no more than half of the retiree's disposable retired pay may be awarded to the former spouse as divisible property, § 1408(e)(1). Retirement pay waived to receive disability benefits is excluded. § 1408(a)(4)(B); *Mansell v. Mansell,* 490 U.S. 581, 594-95, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). Although it was signed into law on September 8, 1982, and became effective February 1, 1983, the statute expressly covered payments to retirees after June 25, 1981, the day the Court handed down *McCarty.* Congress later clarified that former spouses could not seek a share of retired pay if their divorce or separation became final before June 25, 1981, and the state court did not "treat (or reserve jurisdiction to treat) any amount of [the] retired pay of the member" as divisible property. 10 U.S.C. § 1408(c)(1).

By referring to the "law of the jurisdiction" of a court issuing a divorce order, § 1408(c)(1) unambiguously leaves to the states the choice of whether to treat disposable retired pay earned for service during marriage as divisible property. *See also Barker,* 503 U.S. at 603, 112 S.Ct. 1619 (describing the Act as "giving the States the option of" dividing such pay). It appears that nearly every state has elected to treat military retired pay as divisible marital property. *See generally State-by-State Analysis of Divisibility of Military Retired Pay,* 2002 Army Law. 42. Nevertheless, a division under § 1408(c)(1) can only be made by a state court that has "jurisdiction over the member" based on residence, domicile, or the member's consent. 10 U.S.C. § 1408(c)(4).

Another provision of the Act created a "payments mechanism," *Mansell,* 490 U.S. at 585, 109 S.Ct. 2023, under which the military directly transmits to former spouses the share of retired pay to which they are entitled under state court divorce decrees. *See* 10 U.S.C. § 1408(d). To be eligible for the direct payments, the former spouse must have been married to the member for at least 10 years, and during the marriage the member must have completed at least 10 years of creditable military service. § 1408(d)(2). A former spouse initiates the direct payment process by serving upon the Secretary concerned a state court order "specifically providing for the payment of an amount of the disposable retired pay." § 1408(d)(1). The court order must be "regular on its face," § 1408(b)(1)(B), which means that it "is issued by a court of competent jurisdiction," § 1408(b)(2)(A), and contains no indication that it was issued without legal authority, § 1408(b)(2)(B)-(C).

A Department of Defense (DOD) regulation issued pursuant to congressional authorization, 10 U.S.C. § 1408(j), sets forth further details of the payments mechanism. *See* DOD Financial Management Regulation, Volume 7B, Ch. 29, DOD 7000.14-R (July 2005), *available at* www.dod.mil/comptroller/fmr/07b/07 b--29.pdf. After a former spouse submits a certified copy of the state court order, the DOD's Defense Finance and Accounting Service (DFAS) must verify that the order satisfies the statutory requirements. *Id.* ¶ 2906. If the order adjudicated the right of a member who was on active duty and not represented in court, the order must certify that the court afforded the member the procedural protections due under the Servicemembers Civil Relief Act (SCRA), 50 App. U.S.C. § 501 *et seq. Id.* ¶ 290602. If, however, the court order is regular on its face, DFAS does not further review the case to determine whether the rendering court had personal jurisdiction over the retiree. *Id.*¶ 291003. Within

30 days of effective service of the order, DFAS must notify the affected retiree in writing. *Id.* ¶ 290901. The retiree is entitled to respond, and DFAS "will not honor the court order if it is defective or is modified, superseded, or set aside." *Id.* ¶ 290903. The retiree or the former spouse may later file a request that DFAS reconsider its decision regarding the court order based on specified reasons. DFAS must "respond to the request for reconsideration, giving an explanation of the determination reached." *Id.* ¶ 2912.

B.

The 58 individual plaintiffs in this case are either retired armed service members drawing retirement pay or active duty members who will be eligible for this pay on retirement. On various dates between 1978 and 2003, these 58 individuals were all divorced. They are subject to state court divorce orders granting their former spouses a portion of their retirement pay. DFAS makes direct payments to the former spouses of at least some of the plaintiffs. The plaintiff association is the Uniformed Services Former Spouses' Protection Act Litigation Support Group, or ULSG, a non-profit limited liability corporation. It has nearly 2,500 members, about half of whom have donated money to the association.

The plaintiffs sued the Secretary of Defense in April 2004 in the U.S. District Court for the Eastern District of Virginia. They sought a judgment declaring (1) that the Act violates the members' rights under the Equal Protection Clause and the substantive and procedural components of the Due Process Clause and (2) that the Act is unconstitutional because it allows state courts to apply it non-uniformly. The district court granted the Secretary's motion to dismiss. *Adkins v. Rumsfeld,* 370 F.Supp.2d 426 (E.D.Va.2004). The court concluded that it lacked subject matter jurisdiction because it

understood the plaintiffs to be seeking federal appellate review of the state court orders in their divorce proceedings. *Id.* at 429-33; *see D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 416, 44 S.Ct. 149, 68 L.Ed. 362 (1923). In the alternative, the district court concluded, among other things, that the individual plaintiffs lacked standing to proceed in federal court. 370 F.Supp.2d at 432. The court also concluded that the ULSG lacked associational standing because none of its individual members had standing. *Id.* at 433.

On the plaintiffs' motion to alter the judgment, *see* Fed.R.Civ.P. 59(e), the district court granted ULSG leave to amend the complaint to allege associational standing. Once the amended complaint was filed, the Secretary moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. In March 2005 the district court concluded that an affidavit submitted by a ULSG member was sufficient to show that ULSG had standing to bring the equal protection, procedural due process, and uniformity claims. The court held, however, that ULSG could not proceed with its claim that the Act violated the substantive component of the Due Process Clause by retroactively reaching the retirement pay of service members who joined before the Act's passage. The court based this determination on the date the affiant joined the military, which was long after the Act's effective date. Reaching the merits, the district court went on to dismiss ULSG's equal protection claim and the uniformity claim, but allowed the procedural due process claim to go forward. Both sides moved for summary judgment on that surviving claim, and in October 2005 the district court granted summary judgment to the Secretary. This appeal challenging the district court's dismissal and summary judgment orders followed. Our review is de novo.

II.

We must examine at the outset whether the district court erred in holding that it lacked subject matter jurisdiction over the individual member's claims. Congress has vested only the Supreme Court with jurisdiction to review state court decisions. 28 U.S.C. § 1257. The *Rooker-Feldman* doctrine, a corollary to this rule, prohibits "lower federal courts ... from exercising appellate jurisdiction over final state-court judgments." *Lance v. Dennis*, --- U.S. ----, ----, 126 S.Ct. 1198, 1201, 163 L.Ed.2d 1059 (2006) (per curiam). The Supreme Court has recently underscored that *Rooker-Feldman* is a "narrow doctrine." *Id.* It deprives district courts of subject matter jurisdiction over "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). Formulated in this way, the doctrine forbids claims that "seek [ ] redress for an injury caused by the state-court decision itself" because they "ask[ ] the federal district court to conduct an appellate review of the state-court decision." *Davani v. Va. Dep't of Transp.*, 434 F.3d 712, 719 (4th Cir.2006). In other words, the doctrine applies "where a party in effect seeks to take an appeal of an unfavorable state-court decision to a lower federal court." *Lance*, 126 S.Ct. at 1202. (The district court in this case ruled before the Supreme Court decided *Exxon Mobil*. It therefore applied our then-governing decisions, which had given the doctrine an "expansive interpretation," an interpretation now "reined in" by the Supreme Court. *Davani*, 434 F.3d at 718.)

The Secretary argues that the individual claims fall within even the narrowed doctrine because the plaintiffs lost in state divorce court proceedings before bringing their federal

suit, and because their injury was ultimately caused by the adverse state court judgments. We need not decide whether we agree with that description of the claims because at least some of the individual plaintiffs--the ones whose pay DFAS redistributes--are not attempting to appeal unfavorable state court decisions. That is, even if these plaintiffs were "state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced," as the concurring opinion takes them to be, *post* at 23, they were *not* "inviting district court review and rejection of those judgments." *Exxon Mobil,* 544 U.S. at 284, 125 S.Ct. 1517. These plaintiffs seek a declaration that the Act is unconstitutional as applied to them. The Act applies to these plaintiffs by requiring the Armed Forces to transmit payments to qualifying former spouses pursuant to state court divorce decrees. *Supra,* part I.A. A federal court declaration that the Act is unconstitutional would invalidate the statutory basis for the federal payments mechanism and effectively prevent DFAS from continuing to transmit payments based on a state court decree. Such a declaration would not, however, amount to appellate reversal or modification of a valid state court decree entered in an individual plaintiff's divorce case. At bottom, an examination of the federal constitutional challenge presented here against the Act does not require scrutinizing and invalidating any individual state court judgment. Contrary to the view expressed in the concurring opinion, the test is not whether the relief sought in the federal suit "would certainly upset" the enforcement of a state court decree, *post* at 23, but rather whether the relief would "reverse or modify" the state court decree. *See Exxon Mobil,* 544 U.S. at 284, 125 S.Ct. 1517 ("Among federal courts, the *Rooker* Court clarified, Congress had empowered only [the Supreme] Court to exercise appellate authority 'to reverse or modify' a state-court judgment.")

(quoting *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S.Ct. 149, 68 L.Ed. 362 (1923)). Or, to put it another way, when the plaintiffs asked the district court here to declare the Act unconstitutional, they did not thereby "call [ ] upon the ... [c]ourt to overturn an injurious state-court judgment." *Exxon Mobil*, 544 U.S. at 291-92, 125 S.Ct. 1517. As a result, the individual plaintiffs whose retirement pay is currently redistributed by DFAS are not "in effect ... appeal[ing]" their state court divorce "decision[s] to a lower federal court." *Lance*, 126 S.Ct. at 1202. The *Rooker-Feldman* doctrine, contracted as it has been by the Supreme Court's recent decisions, therefore did not deprive the district court of subject matter jurisdiction in this case.

Our reading of the claims also shows why the case presents a justiciable controversy in that the individual plaintiffs and ULSG have standing--a matter we must be assured of, even if it is uncontested on appeal. *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). To satisfy the standing requirement, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The plaintiffs contend that when DFAS transmits a portion of a service member's retirement pay to a former spouse pursuant to the Act, DFAS effects a transfer of the member's property. That transfer allegedly inflicts a direct economic harm upon the member that is concrete and not hypothetical. *See, e.g., Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 386 (4th Cir.2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The money transfer follows directly from, and hence is traceable to, DFAS's obedience to the Act; moreover, the injury could be redressed because if a

federal court were to declare the Act unconstitutional, DFAS would have to cease making the transfers. The individual plaintiffs whose apportioned retirement pay is dispensed through the Act's payments mechanism therefore have standing to proceed in federal court. *See, e.g.*, J.A. 119 (alleging that "automatic deduction payments are made to [plaintiff Richard A.] Becker's ex-wife from his retired pay by DFAS"); J.A. 121 (raising identical allegation for plaintiff William F. Conroy, III). Further, because the ULSG members whose retirement pay is dispensed to former spouses under that mechanism have standing, ULSG satisfies the requirements of associational standing. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

Because we conclude that federal subject matter jurisdiction is present, we may proceed to the merits of the constitutional claims.

III.

The plaintiffs challenge the district court's dismissal of their claims invoking substantive due process, the alleged need for uniformity in rules governing military affairs, and equal protection.

A.

The Act does not exempt service members who joined the armed forces prior to its enactment from state court divorce decrees dividing their military retirement pay upon divorce, nor does it exempt these members from the federal payments mechanism that DFAS administers. The service members who joined the military before the statute's enactment allege that the lack of these exemptions retroactively alters the compensation they expected when hired. They contend that this retroactivity

amounts to a violation of the substantive component of the Due Process Clause of the Fifth Amendment. The district court did not resolve this claim because it erroneously concluded that it lacked subject matter jurisdiction. The error has no practical consequence for the claim, however, because the claim fails on the merits.

"[T]he retroactive aspects of economic legislation, as well as the prospective aspects, must meet the test of due process," *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992) (punctuation omitted), because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). The plaintiffs draw an analogy to *United States v. Larionoff*, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977), where the issue was the risk of retroactive government action that would be detrimental to military service members. In that case Congress authorized but subsequently repealed a program that paid variable re-enlistment bonuses to armed forces members whose skills the military critically needed. *Id.* at 865-68, 97 S.Ct. 2150. One plaintiff-service member in *Larionoff* agreed to extend his enlistment while the program was in effect, but did not begin serving his re-enlistment term until after the program's repeal. *Id.* at 878, 97 S.Ct. 2150. The military denied this member a bonus because the program was abolished before his re-enlistment period began. In holding that the member was entitled to the bonus originally promised to him, the Court observed that Congress gave no indication in repealing the program that it also intended to "divest [the member] of the rights he had already earned." *Id.* at 879, 97 S.Ct. 2150.

The plaintiffs cite *Larionoff* in urging us to hold that they are entitled to their undivided military retirement pay. *Larionoff* is a very different case from this one, however. First, the Supreme Court's search in that case for a "clear expression of congressional intent" to alter the rights of members who had extended their enlistments, *id.*, was simply an application of a familiar general rule: " 'a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.' " *Fernandez-Vargas v. Gonzales*, 126 S.Ct. 2422, (June 22, 2006) (quoting *United States v. St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 3, 46 S.Ct. 182, 70 L.Ed. 435 (1926)). This "explicit language" requirement "is a demanding one" that requires statutory language at a "high level of clarity." *INS v. St. Cyr*, 533 U.S. 289, 316-17, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). The requirement was not satisfied in *Larionoff*, 431 U.S. at 879, 97 S.Ct. 2150, but it is satisfied here. Congress decided that the Act would allow state courts to divide military retirement pay earned after June 25, 1981 (again, the day the Supreme Court handed down *McCarty*) in divorce proceedings. Congress made this decision about the temporal reach of the statute clear in the words of the statute itself. 10 U.S.C. § 1408(c)(1). Where Congress has spoken so clearly about the statute's intended reach, the presumption against retroactivity simply does not come into play.

Next, the "settled expectations," *Landgraf*, 511 U.S. at 265, 114 S.Ct. 1483, resulting from the re-enlistment bonus program Congress established and then dismantled in *Larionoff* are not easily compared to those we examine here. As we have emphasized, the Act does not deprive members of their retirement pay. It simply gives state courts the option to divide that pay, and requires the Secretary to enforce state court decisions through direct payments to qualifying spouses. Congress may have promised to pay re-enlistment bonuses of a

certain amount to members in the position described in *Larionoff*. The individual plaintiffs here, however, cannot plausibly allege that at the time they joined the military Congress promised to permanently shield their retirement pay from former spouses presenting valid state court orders. Only the Supreme Court's decision in *McCarty*--not any promise by Congress--could arguably have supported the expectations of some service members that their retirement pay would be shielded in this manner.

Yet even that argument fails. The complaint reveals that none of the individual plaintiffs is entitled to argue that, in the slim window between the *McCarty* decision and the Act's passage, they had a legitimate expectation that their retirement pay would be shielded upon divorce from division and garnishment. Only two plaintiffs in this case allege that they were divorced before the Act was signed into law in September 1982. Indeed, they were divorced before *McCarty* was decided. They are Lloyd E. Stanton, Jr., divorced in Arizona in March 1978, and Carroll Zimmerman, divorced in California in August 1979. Yet the courts of the states in which these plaintiffs were divorced treated military retirement pay as divisible on divorce at the time, *see Van Loan v. Van Loan,* 116 Ariz. 272, 569 P.2d 214, 215-16 (1977); *In re Fithian,* 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449, 451-57 (1974), and the Supreme Court had not yet interpreted federal law as requiring a contrary rule. So even Stanton and Zimmerman cannot claim that the Act deprived them of any expectation based on the *McCarty* holding.

The individual plaintiffs did not state a substantive due process claim upon which relief could be granted. Thus, the district court's error in not reaching that claim does not affect the outcome of the case.

B.

In giving state courts the option to divide military retirement pay upon divorce, the Act tolerates variation among the states in how that pay is actually divided between spouses in individual cases. For example, although Congress provided that the former spouse's share of the member's retirement pay pursuant to an order dividing property may not exceed 50 percent, 10 U.S.C. § 1408(e)(1), state courts are free to award a lesser share as appropriate in an individual case. The plaintiffs argue that the Act "give[s] rise to disparate treatment to service members" and that it "produces non-uniform results when implemented in state law." J.A. 137. This alleged lack of uniformity, they contend, is impermissible under the Constitution's Armed Forces Clauses, U.S. Const., art. I, § 8, cls. 12-14, and the Full Faith and Credit Clause, *id.*, art. IV, § 1.

We disagree. The portion of the Full Faith and Credit Clause the plaintiffs rely on provides that Congress "may by general Laws prescribe the Manner in which [state public] Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.* There is no indication that Congress invoked this clause when passing the Act into law, but even if it had, the clause does not impose on Congress any requirement of substantive uniformity in any area of the law. The word "uniform" is nowhere found in this provision, though it can be found elsewhere in the Constitution. *See, e.g.*, U.S. Const., art. I, § 8, cl. 4 (empowering Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States"). As for the Armed Forces Clauses, " 'judicial deference ... is at its apogee' when Congress legislates under its authority to raise and support armies," *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, --- U.S. ----, ----, 126 S.Ct. 1297, 1306, 164 L.Ed.2d 156 (2006) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981)), and

Congress's decision to allow military retiree pay no special exemption from ordinary state divorce law principles is entitled to precisely this sort of deference. Dismissal of the non-uniformity claim was correct.

C.

The plaintiffs next argue that the Act violates their constitutional right to equal protection by distinguishing between persons based on three classifications. They first allege that the Act's scheme has a disproportionately harmful impact on female service members. This argument attempts to present a sex discrimination claim. The female plaintiffs contend that when Congress enacted the statute it aimed to protect former spouses not employed outside the home (whom Congress allegedly assumed were women) at the expense of the service members (whom Congress allegedly assumed were men). The plaintiffs further argue that although the number of women in the Armed Forces has increased, the statute has not been changed. They allege that allowing the former husbands of female service members to receive a share of their retirement pay is "manifestly unfair," as these former husbands in many cases have their own income. Appellants' Br. at 52. In other words, the plaintiffs contend that the Act discriminates against women in the Armed Forces and in favor of men because former husbands are more likely than former wives to have sources of income other than the divided military retirement pay.

This argument does not state a claim for sex discrimination in violation of equal protection. A statute that explicitly classifies people based on sex is subject to intermediate scrutiny, which means "it must be established at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those

objectives." *Nguyen v. INS*, 533 U.S. 53, 60, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001) (punctuation omitted). In contrast, a statute that does not explicitly classify people based on sex and is thus "gender-neutral on its face," *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), must be assessed under a two-element test before it is reviewed under intermediate scrutiny. First, we ask "whether the statutory classification is indeed neutral in the sense that it is not gender-based," and if so, second, "whether the adverse effect reflects invidious gender-based discrimination." *Id.*

The Act's vocabulary is not sex specific. It refers to service members and former spouses, defining the term spouse as "the husband or wife ... of a member who, on or before the date of a court order, was married to that member." 10 U.S.C. § 1408(a)(6). So we must apply the *Feeney* test. To satisfy the first element of the test, it is not enough that the statute be facially neutral; rather, there must also be no covert sex-based discrimination. *Feeney*, 442 U.S. at 274, 99 S.Ct. 2282. There are, to be sure, isolated statements in the legislative history describing the Act as concerned about service members' wives. *See, e.g.*, S.Rep. No. 97-502, at 43, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1626 (additional statement of Sen. Denton) ("[I]t is virtually impossible to compensate the military *wife* for her efforts caring for husband, family, and home, and in preserving a sense of family stability.") (emphasis added). As the district court recognized, however, these isolated excerpts are inconclusive because the bulk of the congressional materials used sex-neutral terms, speaking of spouses and not wives. *See, e.g.*, S.Rep. No. 97-502, at 6, 1982 U.S.C.C.A.N. at 1601 ("[T]he committee believes that the unique status of the military spouse and that spouse's great contribution to our defense require that the status of the military spouse be acknowledged, supported and protected.").

The second *Feeney* element requires a showing "that a gender-based discriminatory purpose has, at least in some measure, shaped the ... legislation." *Feeney,* 442 U.S. at 276, 99 S.Ct. 2282. The plaintiffs, however, do not and cannot plausibly allege that Congress passed the Act "at least in part 'because of,' not merely 'in spite of,' its adverse effects" upon female service members, *id.* at 279, 99 S.Ct. 2282. Indeed, the plaintiffs complain that Congress did not consider the plight of female service members, which means that Congress cannot have possessed the invidious intent to discriminate against them that would allow us to apply intermediate scrutiny.

The statute therefore does not distinguish between men and women, but between retired service members and their former spouses. We apply rational basis review to this classification. "[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe,* 509 U.S. 312, 319-20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (citations omitted). Under the rational basis test a court must determine (1) "whether the purpose that animates [the challenged] laws and regulations is legitimate," *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel,* 20 F.3d 1311, 1320 (4th Cir.1994), and (2) whether it was "reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose," *id.* (quoting *W. & S. Life Ins. Co. v. State Bd. of Equalization,* 451 U.S. 648, 668, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981)).

The Act survives this rational basis review. First, Congress exhibited special concern for the personal and economic sacrifices that the spouse of a military service member makes to sustain the marriage. *See* S.Rep. No. 97- 502, at 6,

1982 U.S.C.C.A.N. at 1601 ("Child care and management of the family household are many times solely the spouse's responsibility. The military spouse lends a cohesiveness to the family facing the rigors of military life, including protracted and stressful separations."). To be sure, Congress also demonstrated respect for the rights of service members. *See Mansell*, 490 U.S. at 594, 109 S.Ct. 2023 ("[T]he legislative history, read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees."). In any event, Congress could have properly concluded that those sacrifices were even more intense than the ordinary sacrifices associated with marriage to civilian employees, and that former spouses of service members thus deserved additional protection not afforded to former spouses of civilian employees. While not the sole purpose, former spouse protection was a legitimate purpose animating the Act.

Second, the Act was indeed rationally related to this legitimate government interest. As we have explained, the Act has a limited function. It simply freed state courts to divide upon divorce military retirement pay based on service completed during the marriage, which allowed the state courts to increase the property available to the former spouse. The Act additionally established the payments mechanism that makes it easier for some former spouses to receive their share of retirement pay pursuant to state court orders. For this scheme to work, of course, the Act must distinguish former spouses (who are entitled to take advantage of the payments mechanism) from the retired members (whose retirement pay is subject to distribution). The plaintiffs argue that the Act unconstitutionally favors the former spouses over service members by allowing the former spouses access to retirement pay even though they, unlike the members, are not obligated to

continue to perform duties for the government if called upon and are not subject to the military justice provisions. *Supra*, part I.A. This argument presupposes that the retirement pay can only be characterized as compensation for services rendered during retirement. The presupposition is false. Although military retirement pay has some unique features, it also resembles an ordinary civilian pension in many respects, and Congress grasped that resemblance in passing the Act. In particular, the Supreme Court has explained that the Act's "premise behind permitting the States to apply their community property laws to military retirement pay is that such pay is deferred compensation for past services," not "compensation for reduced current services" that the service member performs after retirement. *Barker*, 503 U.S. at 603, 112 S.Ct. 1619. Thus, Congress could reasonably permit states to divide military retirement pay in favor of former spouses without making those spouses work for this pay, because the pay compensates the member for past services that the member rendered with the former spouse's familial, emotional, and other support.

The plaintiffs also contend that the Act creates a second classification by treating retired service members less favorably than other former federal employees. One of their concerns is that the Act does not contain a remarriage cutoff, so a former spouse who remarries does not thereby forfeit the right to receive the determined portion of the service member's retired pay. In contrast, certain payments to former spouses of employees in the civil service, foreign service, and intelligence agency are terminated if those spouses remarry before reaching a specified age. *See, e.g.*, 5 U.S.C. § 8445 (civil service); 22 U.S.C. § 4054 (foreign service); 50 U.S.C. § 2032 (Central Intelligence Agency). After reviewing the Act for Congress, the DOD concluded that the absence of a remarriage cutoff provision requires no legislative correction because the question

is best answered in individual cases by state courts. *See* DOD, A Report to Congress Concerning Federal Former Spouse Protection Laws 82 (2001) ("State courts, not Federal law, should determine the effect of remarriage."), *available at* http://www.dod. mil/prhome/spouserev.html (hereinafter Former Spouse Protection Report). The decision whether to include a remarriage cutoff in the statute is properly left to Congress. The Constitution simply does not compel Congress to provide for the service members a system entirely identical to the one created for other government officers. The spouses of service members make unique sacrifices during marriage, foregoing in many cases the opportunity "to pursue ... career [s]" of their own. S.Rep. No. 97-502, at 6, 1982 U.S.C.C.A.N. at 1601. Recognizing these sacrifices, Congress could reasonably have concluded that a remarriage cutoff was not necessary and that state courts should be free to resolve the question. If one purpose of allowing the former spouse to receive a portion of the military retirement pay is to provide economic support, Congress was not obligated to assume that the need for this support would *always* disappear upon the former spouse's remarriage.

For these reasons, the district court correctly dismissed the equal protection claim.

IV.

Finally, the plaintiffs challenge the district court's grant of summary judgment in favor of the Secretary on their claim that the Act and its implementing regulations do not provide procedural due process. To evaluate the Act's compliance with the Due Process Clause's procedural component, a court must determine (1) whether the plaintiffs "los[t] something that fits into one of the three protected categories: life, liberty, or

property," and (2) whether the plaintiffs "receive[d] the minimum measure of procedural protection warranted under the circumstances." *Mallette v. Arlington County Employees' Supp. Ret. Sys. II,* 91 F.3d 630, 634 (4th Cir.1996). The parties do not dispute that retired service members have a property interest in their military retirement pay created by federal statutes. *Supra,* part I.A. They also appear to agree that by allowing certain former spouses to enforce state court orders dividing the marital estate, the federal payments mechanism at least contributes to a deprivation of this property interest. The parties focus instead on the second part of the procedural due process test. The plaintiffs contend that due process requires the Secretary to investigate the jurisdictional basis for every state court divorce decree, instead of accepting as valid all decrees that are "regular on [their] face." 10 U.S.C. § 1408(b)(2). They also claim that the Secretary must fully indemnify a retiree for any pay given to the former spouse based on an invalid divorce decree. The plaintiffs insist further that the Secretary must review whether the state court complied with the terms of the Servicemembers Civil Relief Act, 50 U.S.C. app. § 501 *et seq.*, rather than taking as true the state court's certification that it has complied with this statute. In the plaintiffs' view, moreover, due process requires pre- and post-deprivation remedies and procedures more formal than the "informal, ex parte, and incomplete" reconsideration provision set forth in DOD 7000.14-R ¶ 2912. Appellants' Br. at 44.

In *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285, 45 S.Ct. 61, 69 L.Ed. 288 (1924), the Court upheld a state law that allowed a creditor with a valid state court judgment to garnish the debtor's wages without additional notice. The Court reasoned that the pre-deprivation proceeding was sufficient to put the debtor on notice that his property could be subject to the creditor's claim. *Id.* at 288-89, 45 S.Ct. 61. It

held that "in the absence of a statutory requirement, it is not essential that [the judgment debtor] be given notice before the issuance of an execution against his tangible property." *Id.* at 288, 45 S.Ct. 61. The Secretary contends that *Endicott-Johnson* forecloses the plaintiff's procedural due process attack because the state court divorce proceedings give members all the notice that they are due. Although *Endicott-Johnson* has not been overruled, it was decided before the Court significantly revised its approach to due process rights, and since then courts have been reluctant to give *Endicott-Johnson* controlling weight. *See Aacen v. San Juan County Sheriff's Dep't,* 944 F.2d 691, 695 & n. 5 (10th Cir.1991) (explaining that *Endicott-Johnson* focused on "*pre*-execution notice of seizure and hearing" and that various courts "have questioned the precedential value of *Endicott-Johnson* in light of modern due process decisions."); *see also* Diana Gribbon Motz & Andrew H. Baida, *The Due Process Rights of Postjudgment Debtors and Child Support Obligors,* 45 Md. L.Rev. 61, 64-69 (1986) (noting judicial hesitation in relying on *Endicott-Johnson* in the aftermath of procedural due process cases such as *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969)). Instead of relying on *Endicott-Johnson,* the district court went on to examine the Act and the regulations using the balancing test first articulated in *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and found that the payments mechanism satisfied this test.

We need not decide whether the plaintiffs' claim is properly assessed through a direct application of *Endicott-Johnson* or through the *Mathews* balancing test, because in the end they show the same thing: the Act and the regulations provide all that due process requires. *Endicott-Johnson* suggests that service members who dispute the state court's allocation of retired pay to their former spouses

must present their legal or factual arguments to the state courts, not save these arguments to raise them later before DFAS. *Mathews* requires attention to three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including ... the fiscal and administrative burdens that the additional ... procedural requirement would entail.

424 U.S. at 335, 96 S.Ct. 893. Here, the "private interest that will be affected by the official action," *id.*, is the service member's federal statutory right to retirement pay. As we have already explained, the Act qualifies that right by empowering state courts to award to the former spouse up to 50 percent of the pay as marital estate property. Retirement pay is a significant asset, so the private interest is not trivial, but neither is it so weighty as to eclipse the other factors.

The next concern is the risk of error. In enforcing state court orders, DFAS might err in several ways. For example, DFAS might accept a state court order as regular on its face and make payments accordingly even though there is some hidden jurisdictional, procedural, or substantive defect in that order. The plaintiffs offer no evidence that DFAS makes an unacceptably high number of errors under the existing scheme; indeed, they present no evidence concerning the error rate at all. The plaintiffs also present no evidence that DFAS commonly overpays former spouses, based on its own errors or on those of state courts, and then fails to compensate service members for the resulting loss. The only relevant evidence in the record was

to the contrary: a DFAS employee testified that if a former spouse is overpaid because of a DFAS error, once DFAS learns of the error it reduces future payments to that former spouse until the effect of the overpayment is canceled out. The agency's lack of a written regulation governing this process is not relevant.

Without empirical evidence that the payments mechanism does not work *in practice,* we can only consider the risk of error in the mechanism *as described* in the statutes and regulations themselves, and we conclude that the risk is minimal. To begin with, we have no basis for assuming that state courts routinely favor former spouses over service members in dividing military retirement pay. Any mistakes state courts do make seem likely to be caught by DFAS personnel who, following the regulations, scan the certified state court orders presented for facial compliance with jurisdictional and procedural safeguards for service members. *See* DOD 7000.14-R ¶ 2906. And when that process fails, aggrieved members may request DFAS reconsideration of the decision. *Id.* ¶ 2912.

The plaintiffs speculate that if DFAS were to go beyond the face of the state court orders to assess their validity, DFAS would catch even more state court errors. They do not specify exactly what additional investigation they believe DFAS personnel must conduct to comply with due process, though they hint that DFAS must provide written explanations for individual garnishment decisions as well as create a channel for appellate review of those explanations. Requiring the addition of any procedures would bear on the government's interest in the *Mathews* balancing. More intensive review would slow payments processing. DFAS sends monthly retirement pay distributions to about 54,000 former spouses, *see* Former Spouse Protection Report, *supra* part III.C., at 19 (providing

figures as of April 1, 1999), and all of them might have to wait longer to get their share of retirement pay if DFAS employees must review in finer detail the underlying merits of state court divorce orders. If DFAS did not want to increase case-processing time, it would have to hire additional staff, which would raise the government's total expenses for running the payments mechanism.

We conclude that requiring DFAS to conduct additional review before complying with state court orders would harm the government's interest in minimizing administrative expenses without demonstrably reducing the error rate of the existing enforcement system. Due process does not require more than DFAS already provides pursuant to the Act. The district therefore correctly granted summary judgment to the Secretary on the procedural due process claim.

V.

For all of these reasons, we uphold the statute and affirm the district court orders of dismissal and summary judgment.

AFFIRMED

WIDENER, Circuit Judge, concurring:

I concur in the result. I write separately, however, because I am of opinion that the district court correctly determined that it lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine.

Exxon Mobil reaffirmed that the doctrine

> is confined to cases of the kind from which the doctrine acquired its name: cases brought by

> state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.

Exxon Mobil Corp., 544 U.S. at 284, 125 S.Ct. 1517.

That is precisely the case we have here. The plaintiffs are inviting district court review of their individual state court judgments when they ask the federal court to declare the Act unconstitutional. These plaintiffs are "state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced." *Exxon Mobil Corp.*, 544 U.S. at 284, 125 S.Ct. 1517. Declaring the Act unconstitutional would certainly upset those judgments for payments ordered by the state court decisions would cease. Such an outcome in federal court likens this case to "the kind from which the doctrine acquired its name." *Exxon Mobil Corp.*, 544 U.S. at 284, 125 S.Ct. 1517.

Thus, I would affirm the judgment of the district court but on its reasoning: that the *Rooker-Feldman* doctrine divested it of subject matter jurisdiction.

United States Court of Appeals,
Fourth Circuit.

Tammy ADKINS; Gerrit J. Allen; Daniel Anderson; William Arnold; Donald O. Austin; Robert M. Balick; Charles A. Barat; Richard A. Becker; Paul A. Brandmire; Ricky L. Brennan, Sr.; Robert D. Buxton; John Capewell; Philip P. Casale, Sr.; William F. Conroy, III; Frederick A. Cook; Ronald L. Deming; William H. Drawbond; Brian D. Dunn; Clifford C. Eckert; Stephanie A. Eeckhout; Sherry E. Fancher; Wendell D. Farris; Richard D. Ferrell; Terry P. Fletcher; Robert Frick; Maurice R. Gagnon; Gregory L. Goins; Steven M. Hanger; Gregory Harris; Jackie D. Hawkins; Brian J. Hendricks; Diane Hobbs; James William Hunter; William Paul Kennemer; William J. Koselka; Roger Ledbetter; James W. Loberg; Kenneth Manring; Stephen Monks; Frederick Nehrings; John B. Noone, Jr.; Edwin E. Ostroot, II; Steven Perrin; Marvin L. Potts; Lorraine C. Reis; Ronald A. Resare; Donald E. Rotunda; Michael Speir; Lloyd E. Stanton, Jr.; Marvin G. Stroud, Jr.; Robert W. Throckmorton; Glenn Udart; Michael Varela; Mickey Wright; Dorothy J. Yarde; George Zamora; Carroll Zimmerman; ULSG, LLC; Bruce Paquette; Arthur Wilson, Plaintiffs-Appellants,

v.

Donald H. RUMSFELD, Defendant-Appellee.

No. 05-2307

CA-04-494-JCC.

Filed November 14, 2006

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Widener, Judge Michael, and District Judge Goodwin.

For the Court

/s/ Patricia S. Connor
Clerk

United States District Court,
E.D. Virginia.
Tammy ADKINS, et al., Plaintiffs,
v.
Donald RUMSFELD, Defendant.
No. 1:04CV494 (JCC).

Oct. 13, 2005.

MEMORANDUM OPINION

CACHERIS, J.

This matter is before the Court on cross-motions for summary judgment pursuant to this Court's Order on June 28, 2005 that all dispositive motions in this matter be heard together on the present motions day. For the reasons stated below, the Court will deny Plaintiff's motion for summary judgment and grant Defendant's motion for summary judgment.

I. Background

Plaintiff, ULSG, LLC ("ULSG"), is a non-profit company. ULSG is an acronym for "USFSPA Litigation Support Group." ULSG, along with fifty-eight additional named Plaintiffs, originally brought this action against Donald Rumsfeld in his official capacity as Secretary of Defense. Those named Plaintiffs were retired veterans of the armed forces who were drawing, or eligible to draw, retirement pay and who were active duty service members who would have been eligible to receive pay when they retired. All fifty-eight named Plaintiffs

were divorced, and their divorce decrees or related property settlements included provisions that granted their former spouses a portion of their retirement pay.

The original Plaintiffs, including ULSG, sought, *inter alia,* a declaratory judgment that portions of the Uniformed Services Former Spouses' Protection Act, ("the Act" or "the USFSPA"), 10 U.S.C. § 1408, are unconstitutional. The Act allows state courts with proper jurisdiction to treat military retirement pay as marital property to be divided upon the divorce of members of the military and their former spouses. *See* 10 U.S.C. § 1408(c)(1) (2004).

The Complaint was filed on April 30, 2004 seeking a declaratory judgment that: (1) the Act denies veterans substantive due process by applying retroactively to service members who entered the military before the Act was passed; (2) the Act denies the Plaintiffs procedural due process; (3) portions of the Act are unconstitutional because they allow non-uniform application by state courts; and, (4) the Act denies the Plaintiffs equal protection.

By Order entered October 12, 2004, the Court granted the Secretary's motion to dismiss the fifty-eight Plaintiff claims and ULSG's claims for, *inter alia,* a lack of standing to assert their claims. By Order entered November 22, 2004, the Court amended its October 12, 2004 judgment to grant ULSG leave to amend the Complaint to allege associational standing. On December 6, 2004, ULSG filed an Amended Complaint, and Defendant subsequently filed a new motion to dismiss. By Order entered March 16, 2005, the Court held that ULSG had alleged standing to assert all but the substantive due process claim due to the circumstances of at least one of its members. As a result, the substantive due process claim was dismissed because the one individual member of ULSG that provided standing for the

other challenges could not provide standing for the substantive due process issue. In the same Order, the Court granted Defendant's motion to dismiss the uniformity and equal protection claims as failing to state a claim upon which relief could be granted.

Defendant's motion to dismiss the procedural due process claim was granted as to one issue--notice to a former military member at his or her "last known address" is constitutionally sufficient. As to the other four claims regarding procedural due process, the Court denied Defendant's motion to dismiss. Therefore, these claims concerning procedural due process constitute the only remaining issues in this matter.

On August 15, 2005, Plaintiff filed a Motion for Summary Judgment on the procedural due process claims. On August 17, 2005, Defendant filed a Motion for Summary Judgment on the same claims. These motions are currently before the Court.

II. Standard of Review

As set forth in Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when the moving party can show by affidavits, depositions, admissions, answers to interrogatories, pleadings, or other evidence "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Rule 56 mandates entry of summary judgment against a party who "after adequate time for discovery and upon motion ... fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The moving party is not entitled to summary judgment if there is a genuine issue of material fact in dispute. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of fact exists if a reasonable jury could return a verdict for a nonmoving party. *See id.* In other words, summary judgment appropriately lies only if there can be but one reasonable conclusion as to the verdict. *See id.* As the Fourth Circuit explained,

> [W]e must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion. Summary judgment is appropriate only where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, such as where the non-moving party has failed to make a sufficient showing on an essential element of the case that the non-moving party has the burden to prove.

Tuck v. Henkel Corp., 973 F.2d 371, 374 (4th Cir.1992) (citations omitted), *abrogated on other grounds in Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

III. Analysis

The Due Process Clause of the Fifth Amendment to the United States Constitution guarantees that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. At a minimum, procedural due process requires notice and some opportunity to be heard. *See Mallette v. Arlington Co. Employees' Supplemental Ret. Sys. II*, 91 F.3d 630, 640 (4th Cir.1996). Above that threshold, due process has no fixed content; it is "flexible and calls for such procedural protections as the particular situation demands." *Id.*

(citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). What process is warranted in a given case depends on the balancing of three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The Plaintiff claims four specific instances in which the USFSPA fails to provide procedural due process. Those challenges are generally: 1) USFSPA does not provide veterans with sufficient protection from filings made pursuant to state court orders where the state court did not have proper jurisdiction over the veteran; 2) USFSPA itself does not provide sufficient opportunity for veterans to challenge state court orders before or after deprivation of property occurs; 3) USFSPA fails to provide a mechanism for refund of amounts retained in cases of conflicting state awards or overpayments to former spouses; and 4) USFSPA does not provide for an opportunity for a servicemember to challenge whether the state court observed the provisions of the Servicemembers' Civil Relief Act ("SCRA").

Assuming that the veterans have a protected property interest, Plaintiff's four arguments do not amount to a violation of the Due Process Clause. Firstly, ULSG lacks standing to present the argument relating to 10 U.S.C. § 1408(e)(3) with regard to the potential problem of two state courts ordering

conflicting amounts to be paid to a former spouse. This Court has held that ULSG is proceeding as a plaintiff by means of associational standing resting on the membership of John Youngquist. *Adkins, et al., v. Rumsfeld,* No. 04-494, slip op. at 7-8 (E.D.Va. March 16, 2005). Associational standing is only permitted upon satisfaction of a number of factors, including a requirement that at least one of the entity's members would otherwise have standing to sue in his own right. *Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.,* 528 U.S. 167, 180-81 (2000). Plaintiff provides no evidence that Mr. Youngquist has been subjected to two conflicting state court orders or is in imminent danger of being so situated. Therefore, because Mr. Youngquist would not have standing to assert this claim, ULSG is barred from doing so as well.

Plaintiff's first and fourth arguments generally conclude that the USFSPA fails to provide servicemembers with an "opportunity to be heard" because the Defense Finance and Accounting Service ("DFAS")--the entity to which the Secretary delegated his duties to garnish retired pay--does not independently determine whether a state court possessed personal jurisdiction or honored the veteran's SCRA rights. Specifically, Plaintiff asserts that the "regular on its face" provision--the provision that requires DFAS personnel to review each order that is submitted to determine whether anything on the face of the order would indicate that it was issued without legal authority--is insufficient protection from frivolous, abusive, or fraudulent filings or from proceedings where state courts lacked personal jurisdiction.

Plaintiff relies on *Simanonok v. Simanonok,* 787 F.2d 1517 (11th Cir.1986), to support its position that the Act provides insufficient procedural due process. In that case, the plaintiff was a service member whose divorce decree divided his military retired pay and who was challenging, *inter alia,* that the

Act did not meet the requirements of procedural due process. There, "given the conflicting versions of exactly what procedural rights a retiree is afforded under the Act and on the sketchy record before us, [the court of appeals was] unable to say definitely that a violation of due process has not occurred." *Id.* at 1523. Thus, the court reversed the district court's dismissal of the complaint in order to give the service member an opportunity to clarify and support his objections to the Former Spouse Protection Act.

Importantly, on remand the district court in *Simanonok* held that the member had no legitimate claim of entitlement to the portion of his retirement pay awarded to his ex-wife by their divorce decree, and so was not deprived of any property interest through the workings of the FSPA. Alternatively, the district court held that in any event the member had been provided *all the procedure due him* under the circumstances. *Simanonok v. Simanonok,* 918 F.2d 947, 949 (Fed.Cir. 1990)(emphasis added). Accordingly, *Simanonok* does not support ULSG's position.

The Secretary forwards *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.,* 266 U.S. 285 (1924), as persuasive precedent to support his claim that the USFSPA need not provide any additional hearing following the state court judgment. Defendant interprets this case to mean that because an individual has received an opportunity to be heard during proceedings that resulted in a court order, the individual is not entitled to re-litigate the propriety of the court order through a garnishing agency or entity before the order is executed. *Id.* at 288. The Defendant concedes that *Endicott* has come under scrutiny in situations in which a general judgment is obtained that can be executed through the garnishment of any one of a number of assets. However, the Defendant assets that unlike a general judgment, the USFSPA mandates that DFAS garnish the member's retired pay in favor of direct payments to the former

spouse. Therefore, *Endicott* is persuasive and no re-litigation of the propriety of the state court judgment is required. The Court agrees both with this reading of *Endicott* and its application to the facts of this case.

Endicott notwithstanding, the USFSPA provides veterans with a constitutionally-sufficient opportunity to be heard. The protections that USFSPA provides are extensive. To summarize:

> The former spouse who seeks to have the member's retired pay garnished pursuant to a state court decree must send a certified copy of that order to DFAS, along with a signed application that, *inter alia*, swears (under penalty of perjury) that the order has not been vacated, superceded, or set aside.... DFAS personnel review the application and court order to ensure that the court determined that it could maintain personal "jurisdiction over the member" ... and that proceeding to enter a divorce decree was consistent with the member's SCRA rights. Consistent with the USFSPA's definition of the phrase "regular on its face," DFAS personnel also review the order to determine whether anything on the face of the order would indicate that it was issued without legal authority. If the state court order--as well as any supporting documentation submitted by the former spouse--does not contain this information, DFAS rejects the garnishment application.
>
> [Upon acceptance of the application, t]he member has thirty days within which to challenge the proposed retired pay garnishment

> before payments will begin to the former spouse. In this regard, the member can bring anything he or she desires to the attention of DFAS personnel.... Once DFAS considers the member's response and "rules" on the same, the member is always entitled to reconsideration, and DFAS must respond to each such request in writing.

(Def.'s Mot. at 18-19.)

In weighing the three prongs of the *Mathews* balancing test, the provisions of the USFSPA meet the requirements of procedural due process. Although perhaps the private interests affected by the garnishment have the potential of being costly, they still constitute only a portion of each member's retirement pay. The risk of an erroneous deprivation of the pay, given the elaborate pre-garnishment process, is likewise low. Finally, the fiscal and administrative burdens, much less the Constitutional consequences, of instituting any additional requirements would be prohibitive. Any remedy in this regard that Plaintiff is seeking should come from Congress and not the courts. Accordingly, Plaintiff's argument that the Due Process Clause requires DFAS to independently review each state court decision for proper personal jurisdiction and SCRA compliance is dismissed.

ULSG, in its second and third arguments, alleges that USFPSA fails to provide servicemembers with constitutionally-sufficient post-deprivation procedure, specifically in retrieval of wrongfully garnished payments. However, as this Court stated earlier in this matter, post-deprivation remedies are relevant insofar as such can rescue statutory or regulatory schemes that have sub-par pre-deprivation process. *Adkins, et al., v. Rumsfeld,* No. 04-494, slip op. at 14 (E.D.Va. March 16, 2005). It appears that no

decision has ever held that the mere lack of post-deprivation remedies against the government itself caused a statutory and/or regulatory scheme to run afoul of the Constitution. This Court previously held that "since it is not clear whether the Act provides sub-par pre-deprivation process, post-deprivation remedies may be relevant." *Id.* Now that it is clear that pre-deprivation process is sufficient, post-deprivation process is irrelevant.

IV. Conclusion

For the reasons stated above, the Court will deny Plaintiff's Motion for Summary Judgment and grant Defendant's Motion for Summary Judgment. An appropriate Order will issue.

United States District Court,
E.D. Virginia,
Alexandria Division.
Tammy ADKINS, et al., Plaintiffs,
v.
Donald RUMSFELD, Secretary of Defense, Defendant.
No. 1:04CV494JCC.

March 16, 2005.

MEMORANDUM OPINION

CACHERIS, District Judge.

This matter is before the Court on Defendant's motion to dismiss Plaintiff ULSG's Amended Complaint. For the reasons stated below, the Court will partially grant and partially deny Defendant's motion.

I. Background

Plaintiffs are 58 divorced individuals and ULSG, LLC, ("ULSG"), a non-profit company. ULSG is an acronym for "USFSPA Litigation Support Group." The 58 Plaintiffs are retired veterans of the armed forces who are drawing, or are eligible to draw, retirement pay, and active duty service members who will be eligible to receive retirement pay when they retire. All 58 Plaintiffs are divorced and their divorce decrees or related property settlements include provisions that grant their former spouses a portion of their retirement pay.

Plaintiffs brought this action against Donald Rumsfeld

in his official capacity as Secretary of Defense, seeking, inter alia, a declaratory judgment that portions of the Uniformed Services Former Spouses' Protection Act, ("the Act" or "the USFSPA"), 10 U.S.C. § 1408, are unconstitutional. The Act allows state courts with proper jurisdiction to treat military retirement pay as marital property to be divided upon the divorce of members of the military and their former spouses. See 10 U.S.C.§ 1408(c) (1) (2004).[1]

The Complaint was filed on April 30, 2004. The Plaintiffs seek a declaratory judgment that: (1) the Act denies veterans substantive due process by applying retroactively to service members who entered the military before the Act was passed; (2) the Act denies the Plaintiffs procedural due process; (3) portions of the Act are unconstitutional because they allow non-uniform application by state courts, or declaratory relief as to the proper, uniform construction of the Act to be applied by state courts; and (4) the Act denies the Plaintiffs equal protection.

By Order entered October 12, 2004, the Court granted the Secretary's motion to dismiss the 58 Plaintiffs' claims and ULSG's claims for, *inter alia*, a lack of standing. By Order entered November 22, 2004, the Court amended its October 12, 2004 judgment to grant ULSG leave to amend the Complaint to allege associational standing. On December 6, 2004, Plaintiffs filed an Amended Complaint. On December 21, 2004,

[1] The Uniformed Services Former Spouses' Protection Act provides in pertinent part: "[A] court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c) (1) (2004).

Defendant filed a motion to dismiss the Amended Complaint. This motion is currently before the Court.

II. Standard of Review

Pursuant to Rule 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Standing is an aspect of subject matter jurisdiction. Am. Jur. PARTIES § 34 (2004); *In re Bennett Funding Group, Inc.*, 336 F.3d 94, 102 (2d Cir. 2003). "For purposes of ruling on a motion to dismiss for want of standing, [the court] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Pacific Legal Found. v. Goyan*, 664 F.2d 1221, 1223 (4th Cir. 1981) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). If "the motion challenges the actual existence of the Court's subject matter jurisdiction, the Court may `look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." Id. (citing *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *Ocean Breeze Festival Park, Inc. v. Reich*, 853 F. Supp. 906, 911 (E.D. Va. 1994)). The burden of proving subject matter jurisdiction is on the plaintiff. McNutt *v. General Motors* Acceptance *Corp.*, 298 U.S. 178, 189 (1936).

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint, *see Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994), and should be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *De Sole v. United States*, 947 F.2d 1169, 1177 (4th Cir. 1991) (citations omitted); *see also Conley v. Gibson, 355* U.S. 41, 45-

46 (1957).

In passing on a motion to dismiss, "the material allegations of the complaint are taken as admitted." *Jenkins v. McKeithen*, 395 U.S. 411 421 (1969) (citations omitted). Moreover, "the complaint is to be liberally construed in favor of plaintiff." *Id.* In addition, a motion to dismiss must be assessed in light of Rule 8's liberal pleading standards, which require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8.

III. Analysis

The issues are: (1) whether Plaintiff ULSG has standing to allege its claims; and (2) if so, whether Plaintiff ULSG's constitutional claims state a claim upon which relief can be granted.

A. Does the ULSG have associational standing?

An association has standing to sue on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 517 (4th Cir. 2003) (citing *Hunt v. Wa. State Apple Adver. Comm'n*, 432 U.S. *333*, 343 (1977)). An individual has standing to sue in his own right if he shows "injury in fact," causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Injury in fact" is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" Id.

"[T]he Supreme Court has never required that every member of an association have standing before it can sue on behalf of its members." *Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R.*, 906 F.2d 25, 34 (1st Cir. 1990), *cert. denied, Rivera Cruz v. Playboy Enters., Inc.*, 498 U.S. 959 (1990). "The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v.* Seldin, 422 U.S. 490, 511 (1975) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)).

The Court initially concluded that ULSG lacked associational standing because it had not shown that its members would otherwise have standing to sue in their own right. (Mem. Op. Oct. 12, 2004 at 14-15). Accordingly, the only issue on standing is whether ULSG has sufficiently alleged that any of its members is "suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the [member himself] brought suit." *Warth,* 422 U.S. at 511 (citations omitted). ULSG alleges that its members fit into four groups, all of which have standing. To show that the ULSG members do sufficiently allege standing, the ULSG offers declarations of Ronald J. King, an officer, principal, and member of the ULSG; John B. Noone, Jr., an officer, principal, member of the ULSG, and named Plaintiff in the litigation; and John R. Youngquist, a member of the ULSG and the United States Army who was on active duty in Iraq when ULSG filed its Opposition to the Motion to Dismiss and when the Court heard

oral arguments on the motion.[2]

ULSG member John R. Younquist states in his declaration that he married his current spouse on April 14, 1995, and separated from her on September 1, 2003 when he received warning orders for Iraq. (Pl.'s Supp. Opp'n, Ex. 1 at 2). Younquist states that his "marriage is irretrievably broken; there is no hope for reconciliation .. ." (Id.) His current spouse has filed for divorce against him in Texas, but the suit has been stayed pursuant to the Servicemembers' Civil Relief Act ("SCRA").[3] (Id.) He expects to be redeployed to the United States in March 2005, at which time he will be obliged to appear and answer the suit. (Id.)

The Secretary concedes in its Reply brief that Younquist's declaration shows "one ULSG member would

[2] The Secretary argues that Youngquist's declaration is not properly before the Court because the Plaintiff filed it without leave of the Court and without seeking the consent of the Secretary. However, the Plaintiff had difficulty obtaining Youngquist's declaration since Youngquist was deployed in Iraq when the Plaintiff was preparing its Opposition to the Motion to Dismiss. In fact, the Opposition referenced Youngquist and his situation, so the Secretary had notice that Youngquist existed and will suffer no prejudice if the Court now considers Youngquist's declaration. Thus, the Court will consider Youngquist's declaration in ruling on the Secretary's Motion to Dismiss.

[3] The pertinent provisions of the Servicemembers' Civil Relief Act provide: "At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days . . . ." 50 U.S.C. App. § 522 (2004).

face a purported imminent injury sufficient to establish standing." (Def.'s Reply at 12). The Court agrees. Youngquist faces personal injury that is both immediate and non-speculative when he returns to the United States and his divorce proceedings resume. He clearly has standing to make the procedural due process, uniformity, and equal protection challenges alleged by the ULSG. Since he is a member of the ULSG, the ULSG has associational standing to bring the procedural due process, uniformity, and equal protection claims.

The substantive due process claim alleges that the Act denies veterans substantive due process by applying retroactively to service members who entered the military before the Act was passed. Since Youngquist entered the military on February 26, 1991, after the Act was enacted,[4] he lacks standing to allege the substantive due process claim.

However, the ULSG members who joined the military before the Act was enacted also lack standing. They either have already divorced, and are prohibited by the Rooker-Feldman doctrine, (see Mem. Op. at 7) (Oct. 12, 2004), or are not yet divorced, and thus do not face personal injury that is imminent or non-speculative. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 105 (1983)("That Lyons may have been illegally choked by the police . . . does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation,or resistance on his part"). Like the plaintiff in *Lyons,* the members of the ULSG who entered the

[4] The Act was enacted on September 8, 1982. Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252 (1982).

military before the Act was enacted and are not yet divorced have not alleged that they face any real or immediate injury. The fact that they may marry, then may divorce, is too speculative and non-imminent to confer standing. Accordingly, no ULSG member has standing to raise the substantive due process challenge, so the ULSG lacks standing to raise this challenge. The Court will grant Defendant's motion to dismiss the substantive due process claim.

B. Do ULSG's remaining constitutional claims state a claim upon which relief can be granted?

The ULSG's remaining constitutional challenges to the Act are: (1) the Act denies service members procedural due process; (2) portions of the Act are unconstitutional because they allow non-uniform application by state courts; and (3) the Act denies service members equal protection. (Am. Compl. ¶¶ 9-25).

1. Procedural due process

The Due Process Clause of the Fourteenth Amendment at a minimum requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Logan v. Zimmerman Brush Co., 455* U.S. 422, 428 (1982); *see also Mallette v. Arlington Co. Employees' Supplemental Ret. Sys. II,* 91 F.3d 630, 640 (4th Cir.1996) (At a minimum, procedural due process requires notice and some opportunity to be heard). Above that threshold, due process has no fixed content; it is "flexible and calls for such procedural protections as the particular situation demands." *Mallette*, 91 F.3d at 640 (citing *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)). What

process is warranted in a given case depends on the balancing of three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

The ULSG alleges four ways that the Act fails to provide procedural due process. First, the ULSG argues that the Act's "regular on its face" provision gives insufficient protection to the member from frivolous, abusive, or fraudulent filings, or from proceedings in state courts that lacked jurisdiction over the member by imposing a duty on the Secretary to mandatorily reduce a member's retirement pay upon receipt of a state court order that appears "regular on its face." 10 U.S.C. §§ 1408(b)(2), (d), (e)(5), (f)(1). The ULSG argues that this provision violates due process by relieving the Secretary from independently determining the validity of a state court order. The ULSG argues that procedural due process requires at a minimum that: (1) the Secretary exercise full diligence in reviewing state court orders, especially to ascertain that the issuing state court had proper jurisdiction; and (2) the member be fully indemnified in situations where a deduction was premised on an order later found to be improper.

Next, the ULSG argues that the statute does not provide effective notice and reply opportunity under section 1408(g) in that it provides no opportunity for a service member to challenge the enforcement of a state court decree. The ULSG argues that mailing the notice to the last known address is insufficient and that since the Defense Finance and Accounting Service ("DFAS") is only required to "consider any response by a retiree," DODFMR ¶290903, or reconsider a decision earlier made, DODFMR ¶2912, deductions are essentially automatic. The ULSG argues that even if the member challenges the state court order in writing, the Secretary's actual practice is to ignore the member's claims and proceed with payment until the Secretary receives notification from a court that an order should not be honored.

The Secretary argues in response that sending notice to the member's last known address is sufficient. Procedural due process requires notice "reasonably calculated to reach interested parties." *Va. Lime Co. v. Craigsville Distrib. Co.*, Inc., 670 F.2d 1366, 1368 (4th Cir. 1982) (citations omitted). Determining whether service of process was reasonably calculated to reach a party involves analysis of the particular circumstances of each case. *Id.* The Secretary argues that since the DFAS is responsible for processing all facets of the member's pay and retirement benefits, see About DFAS, at http://www.dfas.mil/about/ (last visited March 14, 2005), DFAS and the member have already communicated through the member's last known address that DFAS possesses. Moreover, two courts have cited *Va. Lime* to hold that providing notice to the last known address of an individual prior to garnishing wages pursuant to the Higher Education Act was constitutionally sufficient. See *Savage v. Scales*, 310 F. Supp. 2d 122, 135 (D.D.C. 2004); *Nelson v. Diversified Collection Servs. Inc.*, 961 F. Supp. 863, 869 (D. Md. 1997).

The Court finds that providing notice to a service member's last known address prior to garnishing his retirement pay is "reasonably calculated to reach interested parties." *Va. Lime Co.*, 670 F.2d at 1368. Accordingly, the Act provides for constitutionally sufficient notice.

The Secretary argues that the Act also provides a service member sufficient opportunity to be heard before payments are made to their former spouse because the regulations require DOD officials to consider any response by a retiree, reconsider its initial decision at any time that the member desires, and provide a written explanation for any decision adverse to the member.

Third, the ULSG argues that the Act fails to provide a mechanism for refund of amounts retained in cases of conflicting state court awards. See 10 U.S.C. § 1408(e)(3).[5]

[5] The Act provides in pertinent part:

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of thesame member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of-

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or

(continued...)

The ULSG faults the provision for not allowing for a maximum time that disputed amounts will be held pursuant to section 1408(e)(3)(B), and argues that this provision violates due process by allowing the government to retain funds owned and owed to the service member for an indefinite period. The ULSG also takes issue with the "apparent inability of DFAS" to recoup overpayments made by DFAS to former spouses in an equitable fashion to the service member.

[5](...continued)

former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served underthis section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

10 U.S.C. § 1408(e)(2004).

The Secretary argues in response that post-deprivation remedies are relevant insofar as such can rescue statutory or regulatory schemes that have sub-par pre-deprivation process. It appears that no decision has ever held that the mere lack of post-deprivation remedies against the government itself caused a statutory and/or regulatory scheme to run afoul of the Constitution. See Ronald R. Rotunda, et al., TREATISE ON CONSTITUTIONAL LAW § 13.9(c) (7th ed. 2004). However, since it is not clear whether the Act provides sub-par pre-deprivation process, post-deprivation remedies may be relevant.

Fourth and finally, the ULSG argues that while the Act requires that state courts issuing decrees against active duty service members comply with the SCRA pursuant to 10 U.S.C. § 1408(b)(1)(D), no mechanism is provided to a service member to later challenge, either before or after garnishment, whether the provisions of the SCRA were, in fact, "observed" by the state court. The Secretary does not respond to this argument.

The Secretary argues that the ULSG's failure to identify any process that would additionally protect their interests, or consider the cost of that process, should be fatal to its claim under the *Mathews v. Eldridge* framework. The Secretary argues that the only further process that could be suggested would be an oral hearing concerning the garnishment or a mini-trial that would allow the member to relitigate the underlying divorce decree and cites cases holding that neither is required by the due process clause. However given Rule 8's liberal pleading standard and the early stage of the litigation, the ULSG has met the Rule 12(b)(6) standard on its procedural due process claim. With the exception of its argument that the Act provides insufficient notice, ULSG has raised arguments which state a claim upon which relief could be granted.

Accordingly, the Court will deny the Secretary's motion to dismiss this claim.

3. Uniformity

The ULSG argues that in legislating certain aspects of the Act, Congress was required to legislate uniformly so there would be consistent application of the statute to service members located in different states. The ULSG contends that the Act was legislated at the confluence of two congressional powers: the authority "to make Rules for the Government and Regulation of the land and naval forces" which confers on Congress the power to regulate the Armed Forces, U.S. Const. Art. I, § 8, cl. 14, and the power "by general Laws [to] prescribe the Manner in which [state court judicial] Proceedings shall be proved, and the Effect thereof" under the Full Faith and Credit clause. Id. Art. IV, § 1.

However, the ULSG offers no support for this assertion, and the Court is unable to find any information in the statute or its published legislative history indicating by which authority Congress sought to enact the USFSPA. The Secretary assumes that Congress enacted the Act pursuant to its power to regulate the armed forces, but argues that Congress could not have acted pursuant to the Full Faith and Credit Clause. The Court agrees that the Act could not have been enacted pursuant to the Full Faith and Credit Clause.

The ULSG cites *United States v. Kimbell Foods*, 440 U.S. 715, 727 (1979), and *United States v. Currituck Grain Co.*, 6 F.3d 200, 206 (4th Cir. 1993), for the proposition that Congress' power to regulate the Armed Forces has been noted by the Supreme Court as coming with a concomitant duty of uniform legislation. However, the challenged federal laws in those cases did not regulate the Armed Forces, so they do not

support the ULSG's position. Moreover, the facts of those cases are inapplicable to the instant case.

In both cases, the federal regimes contained a gap and the courts had to decide whether federal or state law should fill the gap. In *Kimbell Foods,* the Court explained that "federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules[, while] when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision." 440 U.S. at 728. In both cases, the courts concluded that a federal regime allowing state law to fill the gap was constitutional. If anything, these two cases contradict the ULSG's argument on uniformity.

Finally, the ULSG argues that because the Act fails to prescribe a uniform rule of decision, state courts reach non-uniform results when interpreting the Act, which results in different treatment of veterans in different states. It is true that different state courts have interpreted certain provisions of the Act differently.

However, as the Secretary points out, "[p]ursuant to plaintiff's reasoning, any time that Congress passes legislation concerning the military, and even if it does so in the clearest terms imaginable, if any court – whether state or federal – fails to follow that clear language to the letter, the statute itself runs afoul of the Constitution." (Def.'s Reply, Aug 3, 2004 at 18) (emphasis in original). This is not the rule; the ULSG's argument fails. Accordingly, the Court will dismiss the uniformity claim.

4. Equal protection

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living* Ctr., 473 U.S. 432, 439 (1985) (internal quotation marks omitted).

A gender classification is subject to heightened scrutiny and will fail unless it "serve[s] important governmental objectives and [is] substantially related to achievement of those objectives." *Knussman v. Maryland,* 272 F.3d 625, 635 (4th Cir. 2001) (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)). Classifications based on economic factors need only be rationally related to a legitimate governmental interest. *Faulkner v. Jones*, 10 F.3d 226, 231 (4th Cir. 1993)(citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-40 (1985)). The Supreme Court set forth the following framework:

> [w]hen a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination . . . . In this second inquiry, impact provides an "important starting point," . . . but purposeful discrimination is the "condition that offends

the Constitution."

Austin v. Berryman, 955 F.2d 223, 226 (4th Cir. 1992) (quoting Personnel Adm'r *of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (citations omitted)).

The ULSG argues that the Act is premised on three classifications which violate equal protection. The three classifications are: (1) former uniformed service members as opposed to other former federal government employees; (2) former service member spouses, who are predominantly women, as opposed to former spouses of other federal government employees; and (3) spouses of former members as opposed to the service members themselves. (Am. Compl. ¶ 22). The ULSG alleges that the second classification treats men differently from women and is thus subject to heightened review. The ULSG concedes that the first and third classifications are subject only to rational basis review.

Applying the *Feeney* test to the instant case demonstrates that the ULSG's equal protection challenge to the Act for gender inequality fails. First, the Act is facially neutral as it allows courts to grant former spouses of retired military members a portion of the retiree's retirement pay upon divorce. Because the Act refers to "spouses," which obviously includes both husbands and wives, men and women,[6] the Act is facially neutral.

The second part of the *Feeney* test requires a determination of whether the purportedly gender-neutral statute classification which by design is covertly gender-based. The ULSG cites remarks in the legislative history show that the "USFSPA was clearly intended to benefit the female

[6] *Austin*, 955 F.2d at 226.

spouses of then-serving officers and enlisted personnel." (Pl.'s Opp'n 2[7] at 43) (citing the USFSPA, S. Rep. No. 97-505, 97th Cong., 2d Sees. 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596; 1602-03; 1982 Cong. Rec. 18314, 18315 (remarks of the Act's floor sponsor), 18318 (remarks of Rep. Ferraro), 18319 (remarks of Rep. Whitehurst) (July 28, 1982)). The section of the cited Senate Report discusses a study of California divorce cases disposed of prior to the McCarty decision[8] in the context of whether division of military retired pay has or would adversely affect recruiting and retention. S. Rep. No. 97-502,at 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1602-03. The study:

> analyzed the ways in which divorce settlements have shaped radically different futures for divorced men on the one hand, and for divorced women and their children on the other. . . . [S]ince men are more likely than

[7] "Pl,'s Opp'n 2" refers to the Opposition to Defendant's Second Motion to Dismiss, filed by the ULSG on July 27, 2004.

[8] Prior to the decision in *McCarty v. McCarty*, 453 U.S. 210 (1981), states could consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation. S. Rep. No. 97-502, at 1(1982), reprinted in 1982 U.S.C.C.A.N. 1596, 1596. In *McCarty*, the Supreme Court held that the Supremacy Clause dictated that state courts could not divide a military member's retirement pay upon divorce. 453 U.S. at 232-35. However, the Court indicated that its analysis was based on its interpretation of congressional intent, and that Congress could mandate that military pensions be considered part of the property to be divided upon divorce. Id. at 235-36. Just over one year later, both houses of Congress passed bills that would ultimately become the USFSPA. See S. Rep. No. 97-502, at 1.

> women to hold jobs that allow them to acquire pensions, they are also more likely to be awarded those pensions at divorce.

Id.

However, this is only one section of the report; the remainder of the report speaks in gender neutral terms. For example, the report states:

> The committee received extensive testimony from the uniformed services and public witnesses on the contributions and sacrifices made by the military spouse throughout the service member's career. A recurrent recruiting point that is made to a military couple from the time of the spouse's initial entry into the military is that the spouse is a partner in the member's career. The theme of the "military family" and its importance to military life is widespread and well publicized. Military spouses are still expected to fulfill an important role in the social life and welfare of the military community. Child care and management of the family household are many times solely the spouse's responsibility. The military spouse lends a cohesiveness to the family facing the rigors of military life, including protracted and stressful separations. The committee finds that frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career. affording economic security, job skills and pension protection. Therefore, the committee believes

> that the unique status of the military spouse and that spouse's great contribution to our defense require that the status of the military spouse be acknowledged, supported and protected.

S. Rep. No. 97-502, at 6.

"Committee Reports represent the most persuasive indicia of congressional intent in enacting a statute," Norman J. Singer, 2A SUTHERLAND STATUTORY CONSTRUCTION § 48:6 (6th ed.). Despite the ULSG's assertions otherwise, this report actually shows that the congressional intent in enacting the statute was to allow the division of military retirement pay of a married service member upon divorce, and was in no way motivated by gender discrimination. *See* S. Rep. No. 97-502, at 1.

As for the ULSG's references to remarks made by members of Congress on the floor, "[f]loor statements made by individual members of Congress have limited value in interpreting the intent of Congress as a whole." Singer, 2A Sutherland Statutory Construction § 48:13. Accordingly, the Court finds that the legislative intent was not to discriminate based on gender.

The ULSG has not demonstrated that the classification of "spouse" is, either overtly or covertly, based upon gender. As in *Feeney*, although the law has a disparate impact on one gender, the distinction cited by the ULSG is not gender-based, so the Act must be analyzed as any other neutral law that casts a greater burden upon one sex as a group than upon the other sex. 442 U.S. at 277-78. Since the ULSG has not shown that a heightened standard for gender equality should apply, the Act will be upheld if the classifications it makes are rationally related to a legitimate governmental interest. *Faulkner*, 10

F.3d at 231.

The ULSG argues in its Opposition that three challenged classifications result in the following impermissible burdens on the disadvantaged class members: (1) as between men and women, the incompatibility of the Act in applying to situations where two service members are married to each other;[9] (2) as between men and women, Section 1408(h), concerning the benefits of dependents who are victims of abuse by service members losing the right to retired pay, makes no sense if the service member is female; (3) as between men and women, the Act's treatment of a female service member's retired pay places her at a substantial disadvantage in relation to a non-service member husband; (4) as between former service members and their non-veteran former spouses, veterans are impermissibly disadvantaged to the extent that they must continue to be subject to military discipline and recall to active duty in order to continue receiving their retired pay, while their former spouses will receive their share of retired pay; and (5) as between military veterans and other former government employees, the Act subjects the military retired pay of veterans to greater encumbrances by former spouses than the retirement pay or pensions of other classes of government employees. (Pl.'s Opp'n 2 at 43-49).

Under the rational basis test, "[t]he general rule is that [the] legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1320 (4th Cir.

[9] The Court does not see how this is a burden on one gender resulting from any classification made by the Act.

1994) (citing *Cleburne*, 473 U.S. at 440). "The judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Rational basis analysis presents two questions for review. First, we must determine whether the purpose that animates these laws and regulations is legitimate. Second, we must determine whether it was "reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose." *Smith Setzer*, 20 F.3d at 1320 (citing W. & S. *Life Ins.* Co. *v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981)).

The Senate Report indicates that one purpose of the Act is to acknowledge, support, and protect "the unique status of the military spouse and that spouse's great contribution to our defense . . . ." S. Rep. No. 97-502, at 6. This is because "frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection." Id. Even when invalidating a regime that had allowed states to divide military retirement pay upon divorce in *McCarty*, the Court "recognize[d] that the plight of an ex-spouse of a retired service member is often a serious one," 453 U.S. at 235 (citations omitted), and explained that "Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member." Id. at 235-36. However, the Court explained that this decision was for Congress alone. Id. Supporting and protecting the military spouse clearly is a legitimate state interest.

The second part of the rational basis test is whether it was "reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose." *Smith v. Setzer*, 20 F.3d at 1320. As a threshold matter, the first three burdens alleged by the ULSG, (see Pl.'s Opp'n 2 at 43-45), do not exist because the Act does not make gender classifications. (See *infra* at [55a-56a]). The remaining challenged classifications are: (1) former uniformed service members as opposed to other former federal government employees and (2) spouses of former members as opposed to the service members themselves. (Am. Compl. ¶ 22).

It was certainly reasonable for Congress to believe that the classifications resulting from the Act would provide protection and support for military spouses. By allowing states to consider a service member's military retirement pay as part of the marital property to be divided upon divorce, the Act makes available additional marital property from which the state court will determine the former spouse's share. This was in acknowledgment of the contributions the military spouse made to our country's defense, while facing "frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker [which) make it extremely difficult to pursue a career affording economic security, job skills and pension protection." S. Rep. No. 97-502, at 6. The classifications easily meet rational basis review. Accordingly, the Court will grant the Secretary's motion to dismiss the equal protection claim.

IV. Conclusion

For the reasons stated above, the Court will grant Defendant's motion to dismiss on substantive due process, uniformity, and equal protection claims. The Court will deny

Defendant's motion to dismiss the procedural due process claim. An appropriate Order will issue.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. Defendant's motion to dismiss the substantive due process, uniformity, and equal protection claims is GRANTED;

2. Defendant's motion to dismiss the procedural due process claim is DENIED;

3. Defendant shall file an Answer within 10 days of entry of this Order; and

4. the Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

United States District Court,
E.D. Virginia,
Alexandria Division.
Tammy ADKINS, et al., Plaintiffs,
v.
Donald RUMSFELD, Secretary of Defense, Defendant.
No. 1:04CV494JCC.

Oct. 12, 2004.

MEMORANDUM OPINION

CACHERIS, District Judge.

The issue before the Court is whether portions of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, are unconstitutional. Defendants have filed a motion to dismiss. For the reasons set forth below, the Court finds that Plaintiffs are barred from bringing this suit for lack of subject matter jurisdiction and standing, and alternatively, res judicata. Accordingly, the Court will grant Defendant's motion to dismiss.

I. Background

Plaintiffs are 58 divorced individuals and ULSG, LLC, ("ULSG"), a non-profit company. The 58 Plaintiffs are retired veterans of the armed forces who are drawing, or are eligible to draw, retirement pay, and active duty service members who will be eligible to receive retirement pay when they retire. All 58 Plaintiffs are divorced and their divorce decrees or related property settlements include provisions that grant their former spouses a portion of their retirement pay.

Plaintiffs brought this action against Donald Rumsfeld in his official capacity as Secretary of Defense, seeking, *inter alia,* a declaratory judgment that portions of the Uniformed Services Former Spouses' Protection Act, ("the Act" or "the USFSPA"), 10 U.S.C. § 1408 are unconstitutional. The Act allows state courts with proper jurisdiction to treat military retirement pay as marital property to be divided upon the divorce of members of the military and their former spouses. *See* 10 U.S.C. § 1408(c)(1).[1]

The Complaint was filed on April 30, 2004. The Plaintiffs seek a declaratory judgment that: (1) the Act denies veterans substantive due process by applying retroactively to service members who entered the military before the Act was passed; (2) the Act denies the Plaintiffs procedural due process; (3) portions of the Act are unconstitutional because they allow non-uniform application by state courts, or declaratory relief as to the proper, uniform construction of the Act to be applied by state courts; and, (4) the Act denies the Plaintiffs equal protection.

The Government has filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(1), 12(b)(6).

[1] The Uniformed Services Former Spouses' Protection Act provides in pertinent part: "[A] court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1).

II. Standard of Review

Pursuant to Rule 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1). Where subject matter jurisdiction is challenged, the factual allegations are assumed true. *See Virginia v. United States,* 926 F.Supp. 537, 540 (E.D.Va.1995). If, however, "the motion challenges the actual existence of the Court's subject matter jurisdiction, ... the Court may 'look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.' " *Id.* (citing *Capitol Leasing Co. v. F.D.I.C.,* 999 F.2d 188, 191 (7th Cir.1993); *Adams v. Bain,* 697 F.2d 1213, 1219 (4th Cir.1982); *Ocean Breeze Festival Park, Inc. v. Reich,* 853 F.Supp. 906, 911 (E.D.Va.1994)). The burden of proving subject matter jurisdiction is on the plaintiff. *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936).

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint, *see Randall v. United States,* 30 F.3d 518, 522 (4th Cir.1994), and should be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *De Sole v. United States,* 947 F.2d 1169, 1177 (4th Cir.1991) (citations omitted); *see also Conley v. Gibson,* 355 U.S. 41, 45- 46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

In passing on a motion to dismiss, "the material allegations of the complaint are taken as admitted." *Jenkins v. McKeithen,* 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969) (citations omitted). Moreover, "the complaint is to be liberally construed in favor of plaintiff." *Id.* In addition, a motion to dismiss must be assessed in light of Rule 8's liberal

pleading standards, which require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8.

III. Analysis

The threshold issues are (1) whether this Court has subject matter jurisdiction over the case; and (2) whether the Plaintiffs have standing to bring these constitutional challenges. Because the Court does not have subject matter jurisdiction and the Plaintiffs lack standing, and alternatively, the 58 Plaintiffs' claims are barred by res judicata, the Court does not address whether the Complaint has stated a claim upon which relief can be granted.

The Government alleges that this Court lacks subject matter jurisdiction over the claims asserted by the 58 individual Plaintiffs pursuant to the *Rooker-Feldman* doctrine.[2] The Plaintiffs argue that: (1) the *Rooker-Feldman* doctrine does not apply because the constitutional claims are not "inextricably intertwined" with the state claims; and (2) the *Rooker-Feldman* doctrine does not apply because the constitutional claims fall within the "general attack" exception. The Government also alleges that the Plaintiff organization lacks standing.

[2] *See District of Columbia Ct.App. v. Feldman,* 460 U.S. 462, 482-86, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L.Ed. 362 (1923).

A. The 58 Plaintiffs' Claims

1. The Rooker-Feldman doctrine

Under the *Rooker-Feldman* doctrine, lower federal courts generally do not have jurisdiction to review state-court decisions; rather, jurisdiction to review such decisions lies exclusively with superior state courts and, ultimately, the United States Supreme Court. *Plyler v. Moore,* 129 F.3d 728, 731-32 (4th Cir.1997), *cert. denied* 524 U.S. 945, 118 S.Ct. 2359, 141 L.Ed.2d 727 (1998) (citations omitted). The *Rooker-Feldman* doctrine bars consideration not only of issues actually presented to and decided by a state court, but also of constitutional claims that are "inextricably intertwined with" questions ruled upon by a state court, as when success on the federal claim depends upon a determination "that the state court wrongly decided the issues before it." *Id.* (citations omitted).

Constitutional claims are "inextricably intertwined" when in order to grant the relief sought, the federal court must determine that the state court judgment was erroneously entered or must take action that would render the judgment ineffectual. *Shooting Point, L.L.C. v. Cumming,* 368 F.3d 379, 383-84 (4th Cir.2004) (citations omitted). Essentially, a party losing in state court cannot then seek what in substance would be appellate review of the state judgment in a United States district court based on the losing party's claim that the state judgment itself violates the loser's federal rights. *Id.* (citations omitted).

The *Rooker-Feldman* doctrine also bars issues that could have been raised in the state court proceeding. *Barefoot v. City of Wilmington,* 306 F.3d 113, 120 (4th Cir.2002)(citing *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482 n. 16, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983);

Allstate Insurance Co. v. W. Va. State Bar, 233 F.3d 813, 819 (4th Cir.2000)("The *Rooker-Feldman* doctrine may not be circumvented through artful pleading"); *Guess v. Bd. of Med. Exam'rs of State of N.C.,* 967 F.2d 998, 1003 (4th Cir.1992)).

The Plaintiffs rely on *Wood v. Orange Co.,* 715 F.2d 1543 (11th Cir.1983), to support the proposition that they could not have brought the federal claims before the state court. (*See* Pl.'s Opp'n Mot. to Dismiss at 4- 5). Plaintiffs allege that

> the procedural aspects of [the Act] could not have been litigated in a state divorce court proceeding, because the service member would not have even been aware until after the court's judgment that [the Act] procedures would apply to him or her; a service member would not necessarily be able to predict whether the court would decide to divide his military retired pay as opposed to compensating the former spouse through the division of other property.

Id. at 4.

However, *Wood* is distinguishable from the instant case. In *Wood,* the Plaintiffs did not learn of the state judgment against them until after the time for filing an appeal had elapsed. *Wood,* 715 F.2d at 1548. Accordingly, they lacked a reasonable opportunity to appeal the judgment and raise their constitutional claims in state court. *Id.* However, unlike the plaintiffs in *Wood,* a plaintiff "who was aware of the proceedings against her, who participated in those proceedings, and who had an opportunity to present her constitutional claims in those proceedings" did have a reasonable opportunity to raise her federal claims in state

court. *Leaf v. Sup. Ct. of State of Wis.*, 979 F.2d 589, 599 (7th Cir.1992) (distinguishing *Wood* and holding that the district court properly dismissed plaintiff's cause of action for lack of subject matter jurisdiction).

In the instant case, the 58 Plaintiffs were assumably aware of and participated in their divorce proceedings. Unlike the plaintiffs in *Wood*, they learned of the state court judgments adverse to them when the judgments were entered and well within the time to file an appeal. Accordingly, they had a reasonable opportunity to raise their federal claims in state court.

Courts have denied subject matter jurisdiction based on the *Rooker-Feldman* doctrine in actions to enjoin, to set aside and void, or to declare unlawful a state judgment. *See* Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4469.1 (citing *Powell v. Powell*, 80 F.3d 464 (11th Cir.1996)).

In *Powell*, the Eleventh Circuit dismissed the suit for lack of subject matter jurisdiction based on the *Rooker-Feldman* doctrine. In that case, the plaintiff filed suit in federal district court seeking to enjoin the Secretary of the Navy from enforcing a state court judgment that awarded part of the plaintiff's military retirement benefits to his wife pursuant to the USFSPA. The plaintiff claimed that the Act was unconstitutional as applied to him. The plaintiff never raised in state trial court any issue about the Act being unconstitutional, nor did he seek review of the trial court's judgment before the state appellate courts.

The Eleventh Circuit ruled that the plaintiff's federal claim was "inextricably intertwined" with the issue of whether the state court could award his wife part of his retirement pay. If the federal district court were to rule in his favor, the

holding would "effectively nullify" the state court's judgment. "The result would be that the state court's judgment, insofar as it pertains to money to be received by [his wife], would be collaterally reviewed and reversed in federal court, which is precisely what the *Rooker-Feldman* doctrine exists to prevent." *Id.* at 476, 103 S.Ct. 1303.

At oral argument, Plaintiffs explained that their suit seeks prospective declaratory judgments that portions of the Act are unconstitutional. Despite those representations at oral argument, the Complaint indicates that Plaintiffs are seeking other relief. Their procedural due process and equal protection claims seek relief claiming that the Act denies Plaintiffs of their due process and equal protection rights. (*See* Compl. ¶¶ 16, 23-25). Their prayer for relief demands, *inter alia,* "[p]rohibiting federal and state officials and courts from enforcing provisions of the Act that are determined to be unconstitutional; and [g]ranting the Plaintiffs such other and further relief as the Court deems just and equitable." (*See id.* at ¶¶ 25-26). To the extent that they seek to enjoin enforcement of, or to otherwise nullify their divorce decrees, the Court grants the Government's motion to dismiss for lack of subject matter jurisdiction.

2. "General Attack" exception to Rooker-Feldman doctrine

Plaintiffs also argue that they are challenging the constitutionality of the Act, not as applied to them, but in general, which falls under an exception to the *Rooker-Feldman* doctrine. However, the Fourth Circuit has explained that

> [a]lthough *Feldman* permits a general constitutional challenge to a statute [in federal district court], it clearly does not permit the

> same constitutional challenge to be made in the state court and again in the federal court.... Justice Brennan, in footnote 16 of *Feldman*, made clear that even if a claim is not presented to a state court, ... a plaintiff is not entitled to bring that claim in federal court if the claim was one that should have been brought in the state court.

Guess, 967 F.2d at 1003.

Plaintiffs acknowledge that "[t]he exception will apply so long as the relief sought in federal court is not directed towards undoing the prior state judgment." *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 476 (10th Cir.2002). This narrow exception has been carved out for general attacks, such as when a plaintiff seeks a declaratory judgment, effective prospectively, that the statute enforced by the state court is unconstitutional. *See Ritter v. Ross*, 992 F.2d 750, 755 (7th Cir.1993). However, even where the plaintiff purports to bring a "general" challenge, if the only redress he seeks is an "undoing" of the prior state-court judgment, the plaintiff is actually bringing a "particularized challenge to an adjudication against him in state court" which is clearly barred under *Rooker-Feldman*. *Kenmen*, 314 F.3d at 476.

If a plaintiff alleges a general attack, he must still establish that he has proper standing to make the general attack. *Grendell v. Ohio Sup. Ct.*, 252 F.3d 828, 837 (6th Cir.2001)(citing *Landers Seed Co., Inc. v. Champaign Nat'l Bank*, 15 F.3d 729, 732 (7th Cir.1994); *Facio v. Jones*, 929 F.2d 541, 544-45 (10th Cir.1991)(holding that a plaintiff did not have standing to seek declaratory relief, since under the *Rooker-Feldman* doctrine he was "[u]nable to attack the final [state court] default judgment rendered against him," and he

could not show "that he will again be subject to the [state court] default provisions" which would give rise to an actual controversy)); *accord Guess,* 967 F.2d at 1005.

If the 58 Plaintiffs have indeed meet the general attack exception to the *Rooker-Feldman* doctrine by seeking only prospective declaratory judgments, their claims must still be dismissed because they lack standing. In order to have standing, a plaintiff must show "injury in fact," causation, and redressability. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "Injury in fact" is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " *Id.*

First, it is not clear that the 58 Plaintiffs have made a general attack. Count II of the Complaint alleges that the Act's "deficiencies constitute a deprivation of *plaintiff's property* without due process of law." (Compl.¶ 16) (emphasis added). Count IV alleges that "the Act constitutes a denial of *plaintiffs' entitlement* to equal protection of the laws" (*Id.* ¶¶ 23-25) (emphasis added). To the extent that the 58 Plaintiffs seek a judgment that the Act is constitutional as applied to them, the Court will grant the Government's motion to dismiss.

Second, if they have alleged a general attack, they still have not shown that they have standing to bring this attack. As in *Facio,* the 58 Plaintiffs have not shown that they will again be subject to the state court's application of the Act since their divorce decrees have already been entered. Thus, even if the Plaintiffs have managed to allege a general attack on the Act, their suits must be dismissed for lack of standing.

Finally, even if the Plaintiffs have alleged a general attack and they have standing, their claims would be barred by res judicata. The Fourth Circuit has clarified that

> the *Feldman* decision does not preclude the application of *res judicata* to general challenges. The Court in *Feldman*, specifically declined to consider the effect of *res judicata* on *Feldman's* general challenge... The Court not only expressly left the door open for such a decision, it directly stated that "by failing to raise his claims in state court, a plaintiff may forfeit his right to obtain review of the state court decision in *any* federal court."

Guess, 967 F.2d at 1004 (quoting *Feldman*, 460 U.S. at 482 n. 16, 103 S.Ct. 1303); *accord Centifanti v. Nix*, 865 F.2d 1422, 1432 (3d Cir.1989) (plaintiff who lacked "a realistic opportunity to fully and fairly litigate" his constitutional claims is not barred by res judicata from bringing those claims in the district court). In *Guess*, there was no reason the *Guess* plaintiff could not have raised his remaining constitutional claims before the state court, so res judicata precluded reassertion of plaintiff's claims.

As Wright, Miller, & Cooper explain:

> [t]he "Rooker-Feldman" doctrine, named after the two decisions described below, establishes a nearly redundant limit on federal subject-matter jurisdiction. The basic theory is that only the United States Supreme Court has been given jurisdiction to review a state-court decision. The general statutes that establish original federal subject-matter jurisdiction in the district courts do not extend to an "appeal" from a state-court judgment. This doctrine is nearly redundant because most of the actions dismissed for want of jurisdiction also could be

> resolved by invoking the claim- or issue-preclusion consequences of the state judgments.

Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4469.1.

In the instant case, the 58 Plaintiffs could have raised their constitutional attacks in state court. Accordingly, their claims are barred by res judicata.

Even if the 58 Plaintiffs have alleged a general attack on the Act, their claim is barred both because they lack standing, and by res judicata. Accordingly, the Court will grant the Government's motion to dismiss with respect to the claims of the 58 Plaintiffs.

B. The Plaintiff Organization's Claim

The Government also seeks dismissal of the Plaintiff ULSG's claim, alleging that the organization lacks organizational standing to assert the claim. An association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 517 (4th Cir.2003)(citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)). As explained above, an individual has standing to sue in his own right if he shows "injury in fact," causation, and redressability. *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. "Injury in fact" is an invasion of a legally protected interest which is (a) concrete and

particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " *Id.*

ULSG has failed to show that it has standing. According to the Plaintiffs, ULSG "was founded and exists for the purposes of overturning the Act." (Compl.¶ 6). The ULSG is the USFSPA Litigation Support Group. (*See* Pl.'s Opp'n Mot. to Dismiss at 7). ULSG's principals include four named individuals, one of which is a named Plaintiff in this case. (*Id.*) ULSG is "essentially a membership organization in which individual veterans subscribe by making financial and in-kind contributions to the organization." (*Id.*)

ULSG has failed to show that its members would otherwise have standing to sue in their own right. The only member it identifies is a named Plaintiff in this case. As explained above, the suits brought by the named Plaintiffs are barred for lack subject matter jurisdiction and standing, and by res judicata. The Complaint does not demonstrate who ULSG's other members are, nor whether they would have individual standing to assert the constitutional challenges alleged in the Complaint. ULSG has not alleged that its members are members of the armed forces or that they face any "injury in fact" that is both concrete and particularized, and actual or imminent.

ULSG has not demonstrated that it has standing to bring the constitutional challenges alleged in the Complaint. Accordingly, the Court will grant the Government's motion to dismiss with respect to the claims brought by ULSG.

IV. Conclusion

For the reasons stated above, the Court will (1) grant the Government's motion to dismiss the 58 Plaintiffs' claims;

and (2) grant the Government's motion to dismiss Plaintiff ULSG's claims. An appropriate Order will issue.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that: (1) Defendant's motion to dismiss the 58 Plaintiffs' claims is GRANTED; (2) Defendant's motion to dismiss Plaintiff ULSG's claim is GRANTED; and (3) the Clerk of the Court shall forward copies of this Order to all counsel of record.

This Order is Final.

UNITED STATES CODE ANNOTATED

TITLE 10. ARMED FORCES

SUBTITLE A – GENERAL MILITARY LAW

PART II--PERSONNEL

CHAPTER 71--COMPUTATION OF RETIRED PAY

§ 1408. Payment of retired or retainer pay in compliance with court orders.

(a) Definitions.--In this section:

(1) The term "court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction;

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country; and

(D) any administrative or judicial tribunal of a State competent to enter orders for support or maintenance (including a State agency administering a program under a State plan approved under part D of title IV of the Social Security Act), and, for purposes of this subparagraph, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court,

or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act (42 U.S.C. 653(p)), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 459(i)(2) of the Social Security Act (42 U.S.C. 659(i)(2)));

(ii) payment of alimony (as defined in section 459(i)(3) of the Social Security Act (42 U.S.C. 659(i)(3))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which--

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 12731 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

(b) Effective service of process.--For the purposes of this section--

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (i) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by facsimile or electronic transmission or by mail;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Servicemembers Civil Relief Act (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order--

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) Authority for court to treat retired pay as property of the member and spouse.--(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court

ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) Payments by Secretary concerned to (or for benefit of) spouse or former spouse.--(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or

a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse (or for the benefit of such spouse or former spouse to a State disbursement unit established pursuant to section 454B of the Social Security Act or other public payee designated by a State, in accordance with part D of title IV of the Social Security Act, as directed by court order, or as otherwise directed in accordance with such part D) in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a spouse or former spouse who, pursuant to section 408(a)(3) of the Social Security Act (42 U.S.C. 608(a)(4)), assigns to a State the rights of the spouse or former spouse to receive support, the Secretary concerned may make the child support payments referred to in the preceding sentence to that State in amounts consistent with that assignment of rights. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under

subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired pay in order to comply with a court order.

(4) Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.

(6) In the case of a court order for which effective service is made on the Secretary concerned on or after August 22, 1996, and which provides for payments from the disposable retired pay of a member to satisfy the amount of child support set forth in the order, the authority provided in paragraph (1) to make payments from the disposable retired pay of a member to satisfy the amount of child support set forth in a court order

shall apply to payment of any amount of child support arrearages set forth in that order as well as to amounts of child support that currently become due.

(7)(A) The Secretary concerned may not accept service of a court order that is an out-of-State modification, or comply with the provisions of such a court order, unless the court issuing that order has jurisdiction in the manner specified in subsection (c)(4) over both the member and the spouse or former spouse involved.

(B) A court order shall be considered to be an out-of-State modification for purposes of this paragraph if the order--

(i) modifies a previous court order under this section upon which payments under this subsection are based; and

(ii) is issued by a court of a State other than the State of the court that issued the previous court order.

(e) Limitations.--(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which

exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) Immunity of officers and employees of United States.--(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired pay to any member, spouse, or former spouse pursuant to a court order that is regular on its

face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (i).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (i), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) Notice to member of service of court order on Secretary concerned.--A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

* * * *

(j) Regulations.--The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

* * * *

{Added Pub.L. 97-252, Title X, § 1002(a), Sept. 8, 1982, 96 Stat. 730, and amended Pub.L. 98-525, Title VI, § 643(a) to (d), Oct. 19, 1984, 98 Stat. 2547; Pub.L. 99-661, Div. A, Title VI, § 644(a), Nov. 14, 1986, 100 Stat. 3887; Pub.L. 100-26, §§ 3(3), 7(h)(1), Apr. 21, 1987, 101 Stat. 273, 282; Pub.L. 101-189, Div. A, Title VI, § 653(a)(5), Title XVI, §

1622(e)(6), Nov. 29, 1989, 103 Stat. 1462, 1605; Pub.L. 101-510, Div. A, Title V, § 555(a) to (d), (f), (g), Nov. 5, 1990, 104 Stat. 1569, 1570; Pub.L. 102-190, Div. A, Title X, § 1061(a)(7), Dec. 5, 1991, 105 Stat. 1472; Pub.L. 102-484, Div. A, Title VI, § 653(a), Oct. 23, 1992, 106 Stat. 2426; Pub.L. 103-160, Div. A, Title V, § 555(a), (b), Title XI, § 1182(a)(2), Nov. 30, 1993, 107 Stat. 1666, 1771; Pub.L. 104-106, Div. A, Title XV, § 1501(c)(16), Feb. 10, 1996, 110 Stat. 499; Pub.L. 104-193, Title III, §§ 362(c), 363(c)(1) to (3), Aug. 22, 1996, 110 Stat. 2246, 2249; Pub.L. 104-201, Div. A, Title VI, § 636, Sept. 23, 1996, 110 Stat. 2579; Pub.L. 105-85, Div. A, Title X, § 1073(a)(24), (25), Nov. 18, 1997, 111 Stat. 1901; Pub.L. 107-107, Div. A, Title X, § 1048(c)(9), Dec. 28, 2001, 115 Stat. 1226; Pub.L. 107-296, Title XVII, § 1704(b)(1), Nov. 25, 2002, 116 Stat. 2314; Pub.L. 108-189, § 2(c), Dec. 19, 2003, 117 Stat. 2866; Pub.L. 109-163, Div. A, Title VI, § 665(a), Jan. 6, 2006, 119 Stat. 3317.}

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No. 06-1132

In the Supreme Court of the United States

TAMMY ADKINS, ET AL., PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408 (2000 & Supp. IV 2004), allows state courts in divorce proceedings to apply state law in determining the status of a service member's disposable retired pay, and it establishes a mechanism for garnishing retired pay to satisfy an appropriate court order. The questions presented are:

1. Whether the statute violates the substantive component of the Due Process Clause insofar as it applies to service members who entered the military prior to its enactment.

2. Whether the statute violates the equal protection component of the Due Process Clause.

3. Whether the statute's garnishment mechanism violates the procedural component of the Due Process Clause.

4. Whether the statute violates the Armed Forces Clauses and the Full Faith and Credit Clause insofar as it allows state law to govern the treatment of a service member's disposable retirement pay in a divorce proceeding.

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In the Supreme Court of the United States

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v.

ROBERT M. GATES, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 464 F.3d 456. The October 13, 2005 decision (Pet. App. 31a-40a) and the March 16, 2005 decision (Pet. App. 41a-64a) of the district court are unreported. The October 12, 2004 decision (Pet. App. 65a-78a) of the district court is reported at 370 F. Supp. 2d 426.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2006. A petition for rehearing was denied on November 14, 2006 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on February 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Members of the military services who have served for the requisite period may retire from active duty and receive retirement pay. See 10 U.S.C. 3911 *et seq.* (Army); 10 U.S.C. 6321 *et seq.* (Navy and Marine Corps); 10 U.S.C. 8911 *et seq.* (Air Force). In *McCarty* v. *McCarty*, 453 U.S. 210 (1981), this Court held that federal law preempts state courts from treating a service member's retirement pay as community property divisible between the service member and his or her former spouse upon divorce. The Court emphasized that Congress could specify a different rule if it chose: "Congress may well decide * * * that more protection should be afforded a former spouse of a retired service member. This decision * * * is for Congress alone." *Id.* at 235-236.

Congress responded to *McCarty* by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA or Act), 10 U.S.C. 1408 (2000 & Supp. IV 2004). In its current form, the Act authorizes a state court to treat "disposable retired pay" either "as property solely of the [service] member or as property of the [service] member and his spouse in accordance with the law of the jurisdiction of such court."[1] 10 U.S.C. 1408(c)(1). If a court has personal jurisdiction over the service member by means of residence (other than on the basis of military assignment), domicile, or consent, then the disposable retirement pay is subject to division

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[1] "Disposable retired pay" is defined in the statute as "the total monthly retired pay to which a member is entitled," less certain amounts, including any amount a service member was required to waive as a condition of receiving disability compensation. 10 U.S.C. 1408(a)(4). See *Mansell* v. *Mansell*, 490 U.S. 581, 594-595 (1989).

with a former spouse if state law permits. 10 U.S.C. 1408(c)(4).

The Act also establishes a process whereby a spouse or former spouse may apply to have the Secretary of Defense (Secretary) pay the court-ordered portion of retirement pay directly to him or her. 10 U.S.C. 1408(d) (2000 & Supp. IV 2004). The total amount of the garnishment cannot exceed 50% of the member's disposable retired pay. 10 U.S.C. 1408(e). To garnish a service member's disposable retired pay, the Secretary must ensure that two conditions are satisfied. First, the Secretary must receive effective service of an appropriate court order. 10 U.S.C. 1408(d)(1). The requirements of effective service include that the court order be "regular on its face," 10 U.S.C. 1408(b)(1)(B), in that it is issued from a court having the requisite jurisdiction over the service member, is "legal in form," and "includes nothing on its face that provides reasonable notice that it is issued without authority of law." 10 U.S.C. 1408(b)(2)(B) and (C). The Secretary must notify a service member of such a court order within 30 days of receiving effective service. 10 U.S.C. 1408(g). Second, the Secretary must conclude that the spouse or former spouse was married to the service member during ten or more years of creditable service. 10 U.S.C. 1408(d)(2).

As authorized by the statute, the Secretary has prescribed detailed regulations governing the garnishment process. See 7B DOD Financial Mgmt. Regs. 7000.14-R, Ch. 29 (2005) (DODFMR) <http://www.dod.mil/comptroller/fmr/07b/07b_29.pdf>. These regulations go beyond what Congress required in providing protections for service members. For example, the spouse or former spouse must agree, before receiving any payment, "that any future overpayments are recov-

erable and subject to involuntary collection from the former spouse or his or her estate." *Id.* para. 290502(F).

2. The individual petitioners in this case are either retired service members receiving retirement pay or active-duty members who are eligible for that pay upon their retirement. Pet. App. 7a. These individuals were all divorced sometime between 1978 and 2003 and are subject to state-court divorce orders granting their former spouses a portion of their retirement pay. *Ibid.* Moreover, the Defense Finance and Accounting Service—the office responsible for administering claims under the Act—makes direct payments to the former spouses of at least some of the plaintiffs. *Ibid.* Also party to this proceeding is the Uniformed Services Former Spouses' Protection Act Litigation Support Group (ULSG), with approximately 2500 members. *Ibid.*

Petitioners filed suit to challenge the constitutionality of the Act on four separate grounds. First, they claimed that the statute violates substantive due process because it alters the compensation expectations of members who joined the service prior to passage of the Act. Pet. App. 12a-13a. Second, they alleged that the statute's mechanism for the garnishment of military retired pay pursuant to a court order in a divorce proceeding fails to meet the requirements of procedural due process because it provides inadequate safeguards against errors and abuse. *Id.* at 22a-23a. Third, petitioners claimed that the statute violates the Constitution's Armed Forces Clauses, U.S. Const. Art. I, § 8, Cls. 12-14, and the Full Faith and Credit Clause, *id.* Art. IV, § 1, because it depends on state divorce law governing the distribution of property, resulting in non-uniform application among retired service members in different States. Pet. App. 16a. Finally, petitioners asserted that

the Act violates the equal protection component of the Due Process Clause because it impermissibly discriminates on the basis of three separate classifications: female service members vis-a-vis their male ex-husbands; service members vis-a-vis their former spouses; and retired service members vis-a-vis other retired federal employees. *Id.* at 17a-22a.

3. The district court dismissed petitioners' claims. Pet. App. 65a-78a. The court concluded that it lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine, because petitioners were effectively asking a federal court to review their state-court divorce judgments. *Id.* at 69a-76a (citing *District of Columbia Ct. of App.* v. *Feldman*, 460 U.S. 462 (1983), and *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923)). The court further held that the individual petitioners lacked standing because their divorce decrees had already been entered, *id.* at 74a, and that ULSG lacked standing because it failed to show that its members had standing to sue in their own right, *id.* at 76a-77a.

After petitioners filed an amended complaint, the court held that ULSG had met its burden to establish standing on three of its four claims. Pet. App. 44a-48a. At least one member of ULSG faced an imminent divorce subject to the requirements of the Act, and since he was not yet subject to a state court judgment, his claim fell outside the *Rooker-Feldman* doctrine. *Id.* at 46a-47a. The court dismissed the substantive due process claim, since the one petitioner who satisfied the standing requirements was not subject to the retroactivity problems that petitioners alleged. *Id.* at 47a.

On the merits, the court dismissed petitioners' uniformity and equal protection claims. Pet. App. 54a-63a. The court subsequently granted the Secretary's motion

for summary judgment on the procedural due process claims. *Id.* at 34a-40a.

4. The court of appeals affirmed. Pet. App. 1a-28a.

a. The court held that both the individual petitioners and ULSG had standing, because the garnishment of their retirement pay constituted an injury, and a determination that the Act was unconstitutional would redress that injury. Pet. App. 11a-12a. It also determined that the *Rooker-Feldman* doctrine was inapplicable because "an examination of the federal constitutional challenge presented here against the Act does not require scrutinizing and invalidating any individual state court judgment." *Id.* at 10a.

The court then addressed the merits, and it rejected petitioners' constitutional claims. First, the court concluded that the Act was not unconstitutionally retroactive, in violation of substantive due process. Pet. App. 12a-15a. The court stated that the presumption against retroactivity was inapplicable because Congress made clear its intent to apply the USFSPA retroactively. *Id.* at 14a. The court further determined that the statute was constitutional because it disrupted no settled expectations of the individual service members, none of whom alleged that he or she was divorced in the period between this Court's decision in *McCarty* and the enactment of the USFSPA. *Id.* at 15a.

The court next rejected plaintiffs' claims under the Armed Forces Clauses and the Full Faith and Credit Clause. Pet. App. 16a-17a. The court explained that the Full Faith and Credit Clause "does not impose on Congress any requirement of substantive uniformity in any area of the law," *id.* at 16a, and that legislation under the Armed Forces Clauses is entitled to special deference, *id.* at 16a-17a. The court also held that the Act

does not violate the equal protection component of the Due Process Clause. *Id.* at 17a-22a. The Act does not classify people on the basis of sex, and it is therefore subject only to rational-basis review. *Id.* at 19a. It satisfies that review, the court explained, because it is rationally related to the legitimate government interest in protecting former spouses of service members, who have made sacrifices that are "more intense than the ordinary sacrifices associated with marriage to civilian employees." *Id.* at 20a.

Finally, the court rejected petitioners' procedural due process claims. Pet. App. 22a-27a. Although petitioners have a property interest in their retirement pay, the court concluded that they had failed to present any evidence of past error in the administration of the garnishment mechanism. Weighing the risk of such error against the costs of further review, the court determined that the procedures afforded to petitioners satisfied the Due Process Clause. *Id.* at 25a-27a (citing *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)).

b. Judge Widener concurred in the result. Pet. App. 27a-28a. In his view, "the district court correctly determined that it lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine." *Id.* at 27a.

ARGUMENT

Petitioners assert (Pet. 14-28) that the USFSPA violates four different provisions of the Constitution. The court of appeals carefully considered and properly rejected petitioners' claims. Its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that application of the USFSPA to service members who joined the

armed forces before its enactment does not violate the substantive component of the Due Process Clause. As applied to those who joined the armed forces before *McCarty* v. *McCarty*, 453 U.S. 210 (1981), the Act is not impermissibly retroactive because it does not "attach[] new legal consequences to events completed before its enactment." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269-270 (1994). Rather, as petitioners recognize, disposable retired pay of service members involved in divorce proceedings was subject to state law until this Court's decision in *McCarty*. The Act merely restored state law as the proper authority governing the treatment of a service member's retired pay in that context.

Petitioners assert (Pet. 16) that "prior to *McCarty*, those serving in the military would have had a reasonable expectation that their military retired pay was not subject to division with a former spouse." They acknowledge, however (Pet. 16 n.2) that this expectation was based entirely on the status of state law in the years leading up to the adoption of the Act. Therefore, the only "reasonable expectation" that petitioners could have held was an expectation that, in the event of a divorce, a court would decide how to treat their retired pay on the basis of state law. That is precisely what the Act provides.

To be sure, the Act might be thought to apply retroactively to the relatively short window between the date of the decision in *McCarty* (June 26, 1981) and the date the Act was signed into law (September 8, 1982). But petitioners do not allege that any petitioner joined the armed forces during that period, nor was any of petitioners' divorce decrees entered then. Pet. App. 15a. Accordingly, a challenge to that aspect of the statute is not presented in this case.

Petitioners principally rely (Pet. 17) on *United States* v. *Larionoff*, 431 U.S. 864 (1977). That reliance is misplaced. In *Larionoff*, the Court refused to construe a statute as having retroactive effect where that effect would have allowed the Navy to deny service members a special bonus that was promised when they agreed to extend their enlistment. *Id.* at 865-869. The Court observed that if Congress had revoked the bonus, "serious constitutional questions would be presented." *Id.* at 879.

Those constitutional concerns are inapplicable here. In *Larionoff*, the plaintiffs were denied their monetary bonus. But as the court of appeals observed in the present case, "the Act does not deprive members of their retirement pay. It simply gives state courts the option to divide that pay." Pet. App. 14a. The cases that *Larionoff* cites, 431 U.S. at 879, regarding the constitutional issues that might arise if Congress intended to make the law retroactive are also not applicable in this context. *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935), stand for the limited proposition that the United States, having entered into a valid contract, cannot break the contract, even where it does so by an express statement. Congress's decision to make clear that a service member's retired pay is subject to state law in the event of a divorce proceeding does not remotely parallel the revocation of rights created under a valid contract.

2. The court of appeals also correctly held that the Act does not violate the constitutional right to equal protection. Petitioners focus their claim (Pet. 19) on the classification that the statute draws between retired service members and their former spouses. Under the Act, if state law permits, former spouses can share in

the service member's retirement pay, even though they are not bound to perform duties for the government if called upon and are not subject to military justice provisions. Pet. App. 20a-21a. Because the classification at issue involves neither a fundamental right nor a suspect class, it is subject to rational-basis review. *Heller* v. *Doe*, 509 U.S. 312, 319-320 (1993). Under this deferential standard, courts ask only whether "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 320.[2]

As the court of appeals concluded, the Act easily satisfies that test. Congress was concerned with the financial security of the military spouse, who often makes enormous sacrifices in that role. See S. Rep. No. 502, 97th Cong., 2d Sess. 6 (1982). That concern was a legitimate reason to make a service member's retirement pay subject to state law in a divorce proceeding, and thereby divisible in some jurisdictions. As the court of appeals determined, the distinction between retired service members and their former spouses is rationally related to that legitimate governmental purpose. "[The Act] simply freed state courts to divide upon divorce military retirement pay based on service completed during the marriage, which allowed the state courts to increase the property available to the former spouse." Pet. App. 20a.

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[2] Petitioners suggest (Pet. 19 n.3) that heightened scrutiny may apply because "it was assumed by Congress that virtually all veterans receiving retired pay were men, and their former spouses were women." But to make heightened scrutiny applicable, petitioners would have to show that Congress "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979). Petitioners have made no effort to meet that standard.

Petitioners contend (Pet. 21) that there is a "dramatic tension" between *McCarty* and *Barker* v. *Kansas*, 503 U.S. 594 (1992), regarding the characterization of military retired pay, and that this case is an appropriate vehicle for resolving it. On examination, however, no such tension exists. In *McCarty*, this Court recognized that it had previously characterized retired military pay as "reduced compensation for reduced current services." 453 U.S. at 222 (citing *United States* v. *Tyler*, 105 U.S. 244, 245 (1881)). But the Court emphasized that it "need not decide * * * whether federal law prohibits a State from characterizing retired pay as deferred compensation, since we agree with appellant's alternative argument that the application of community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation." *Id.* at 223; see also *Barker*, 503 U.S. at 601.

In *Barker*, the Court held that under a federal law consenting to state taxation of a federal employee's pay, "military retirement benefits are to be considered deferred pay for past services." 503 U.S. at 605. *Barker* considered whether Kansas' practice of taxing military retirement benefits, while not taxing the retirement benefits of state and local employees, violated a federal law prohibiting States from taxing federal compensation where such taxation discriminated against the retired federal officer or employee on account of the source of the pay or compensation. *Id.* at 596. Drawing on *Tyler*, the Kansas Supreme Court had held that the state law did not discriminate against United States military retirees in violation of federal law, because their compensation was for current services. *Id.* at 597. This Court rejected that reasoning, holding instead that for pur-

poses of state taxation, retired military pay is compensation for past services and therefore the Kansas law discriminated against service members in that State. *Id.* at 605.

In support of that conclusion, the Court in *Barker* not only observed that the characterization of military pay in *Tyler* was unnecessary to the Court's holding in that case, 503 U.S. at 601, but also noted that Congress adopted the characterization of retired military pay as compensation for past services in passing USFSPA. "Because the premise behind permitting the States to apply their community property laws to military retirement pay is that such pay is deferred compensation for past services, see *McCarty* * * * Congress clearly believed that payment to military retirees is in many respects not comparable to ordinary remuneration for current services." *Id.* at 603. Thus, rather than reflecting a "dramatic tension," the line of cases from *Tyler* to *Barker* demonstrates a consistent willingness to allow States to characterize retired military pay as deferred compensation.[3] Indeed, petitioners cite no court of appeals decisions that identify any divergent treatment in this Court's characterization of retired military pay after *Barker*.[4]

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[3] Petitioners contend (Pet. 21) that "[r]etired pay cannot be deferred compensation in order to defeat petitioners' key equal protection challenge, and also be characterized as something less than a 'settled expectation' in order to repel their substantive and procedural due process attacks." But what is "less than a 'settled expectation'" is not the pay itself (although the military can discontinue it under certain limited circumstances), but the expectation that the pay is exempt from division in a state-court divorce proceeding.

[4] Three of the four cases petitioners cite (Pet. 21) as purportedly noting the "divergent treatment of military pay" as between this

3. Petitioners' procedural due process claim (Pet. 22-25) also lacks merit. The USFSPA and its implementing regulations provide numerous procedural protections to minimize the risk of error in garnishment. Garnishment may be conducted only under a court order that "is issued by a court of competent jurisdiction," that "is legal in form," and that "includes nothing on its face that provides reasonable notice that it is issued without authority of law." 10 U.S.C. 1408(b)(2). In applying for garnishment, the former spouse must present a certified copy of the court order. DODFMR 7000.14-R para. 290502(B). The government administrator must notify the service member of the order as soon as possible, and not later than 30 days after being served. 10 U.S.C. 1408(g). The administrator then must examine the order for compliance with the statutory requirements. DODFMR 7000.14-R para. 2906. If the service member believes the administrator has erred, he or she can request reconsideration, and the administrator is required to respond with an explanation for the decision reached. *Id.* para. 2912. If the service member is still not satisfied, he or she can appeal to the Defense Office of Hearings and Appeals, which will review the written submissions of the member and the administrator, and return a written opinion. 32 C.F.R. 282.5(b), 282 App. E.

Taken together, these requirements provide service members with more than sufficient process to satisfy the Constitution. Moreover, as the court of appeals recognized, petitioners have presented no evidence that the statutory and regulatory protections are insufficient in

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Court's decisions in *McCarty* and *Barker* were decided several years before *Barker*. The only post-*Barker* case that petitioners cite, *In re Moorhous*, 108 F.3d 51, 54 (4th Cir. 1997), simply follows the holding in *Barker*.

practice. In particular, there is no evidence that the Department of Defense "makes an unacceptably high number of errors" or that it "commonly overpays former spouses." Pet. App. 25a.

Petitioners object (Pet. 23) that the court of appeals' decision was based in part on *Endicott Johnson Corp.* v. *Encyclopedia Press, Inc.*, 266 U.S. 285 (1924), which upheld a state law allowing a creditor holding a valid judgment to garnish the debtor's wages without further process. In petitioners' view, *Endicott Johnson* was implicitly overruled by *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). But as petitioners acknowledge, the court of appeals explicitly stated that it was unnecessary to decide "whether [petitioners'] claim is properly assessed through a direct application of *Endicott-Johnson* or through the *Mathews* balancing test, because in the end they show the same thing: the Act and the regulations provide all that due process requires." Pet. App. 24a.

Petitioners mistakenly assume that because the court of appeals' *Mathews* analysis reached the same conclusion as its analysis under *Endicott Johnson*, the former necessarily relied on one or more questionable premises of the latter. That is incorrect. In fact, the court properly applied *Mathews*, recognizing that "retirement pay is a significant asset" but determining that the statutory procedures posed a "minimal" risk of error and that additional procedures would "harm the government's interest in minimizing administrative expenses without demonstrably reducing the error rate of the existing enforcement system." Pet. App. 25a-27a. That conclusion was entirely independent of *Endicott Johnson*, so this case presents no occasion for addressing the relationship between that decision and *Mathews*.

Petitioners err in suggesting (Pet. 25) that the decision below conflicts with *Simanonok* v. *Simanonok*, 787 F.2d 1517 (11th Cir. 1986). *Simanonok* held only that a federal court had subject-matter jurisdiction over a due process challenge to the Act—the same conclusion reached by the court of appeals here. See *id.* at 1522-1523. On remand in that case, the district court held that the Act provided all the process due under the circumstances. See *Simanonok* v. *Simanonok*, 918 F.2d 947, 949 (Fed. Cir. 1990).

4. Finally, petitioners rely (Pet. 25-28) on the Armed Forces and Full Faith and Credit Clauses in arguing that the Constitution prohibits Congress from allowing state law to determine the division of property in the event of a service member's divorce. That claim lacks merit.

As the court of appeals recognized, Congress's exercise of its authority under the Armed Forces Clauses is entitled to considerable deference. Pet. App. 16a-17a; see *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1306 (2006). Petitioners cite no authority for the proposition that the Constitution prohibits Congress from invoking state law when it legislates under the Armed Forces Clauses.

Similarly, as the court of appeals explained, even assuming that the USFSPA was enacted under the Full Faith and Credit Clause, that provision also "does not impose on Congress any requirement of substantive uniformity in any area of the law." Pet. App. 16a. Petitioners cite several cases (Pet. 27-28) supporting the unremarkable principle that the Clause requires States to recognize and give effect to the judicial decisions of other States. Underlying that principle, however, is the assumption that state laws are in fact often not uniform.

Petitioners' position—that the Clause bars federal law from incorporating non-uniform state law—is at odds with the plain meaning of the Clause, finds no support in this Court's decisions, and would invalidate the many instances in which federal law incorporates divergent state laws.

Indeed, even when Congress legislates under a provision of the Constitution that does contain a uniformity requirement, it does not offend that requirement when it incorporates state law into a uniform federal rule. For example, the Bankruptcy Clause—which authorizes Congress to "establish * * * uniform Laws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, Cl. 4—is not violated by 11 U.S.C. 522, which permits States to opt out of the federally prescribed exemptions. See *In re Sullivan*, 680 F.2d 1131 (7th Cir.), cert. denied, 459 U.S. 992 (1982); see also *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181 (1902). The same is true of the Naturalization Clause. U.S. Const. Art. I, § 8, Cl. 4 (authorizing Congress to "establish an uniform rule of Naturalization"); see, *e.g.*, *Nehme* v. *INS*, 252 F.3d 415, 429 (5th Cir. 2001) ("[T]he Constitution simply requires Congress to enact rules of naturalization that apply uniformly throughout the United States, even though those uniform federal rules may produce results that differ by state."). The court of appeals properly held that the Constitution does not bar Congress from allowing state law to determine the division of property under USFSPA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2007

(5)

No. 06-1132

In The
Supreme Court of the United States

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Petitioners,

v.

Robert M. Gates,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Pursuant to S.Ct. R. 15.6, Petitioners respectfully submit this Reply in response to the Solicitor General's filing ["U.S. Br."]. Without even commenting on the wide impact and invidious discrimination that the Uniformed Services Former Spouses' Protection Act ("USFSPA", or "the Act"), 10 U.S.C. § 1408, has for nearly one million American citizen-warriors, see Pet. 6, the government attempts to deflect and down-play many of the serious constitutional defects of the statute, and suggests that further review is unwarranted. But closer examination of the merits of the petition will reveal that petitioners have raised very serious questions as to the constitutionality of the statute, involving fundamental rights concerning veterans' choices of occupation and the right to marry. The Court should grant certiorari in respect to all of the constitutional challenges raised here.

A. Petitioners' Retroactivity and Equal Protection Challenges Deserve Review Based on Incongruent Rulings by this Court in *Tyler*, *Larionoff*, *McCarty* and *Barker*, Regarding the Status of Military Retired Pay as a Personal Asset.

The Solicitor General attempts to diminish petitioners' substantive due process (retroactivity) and equal protection challenges to USFSPA, arguing (U.S. Br. 7-12) that the Fourth Circuit's ruling is not in conflict with previous decisions of this Court regarding the status of military retired pay as a personal asset of the servicemember. The government's contentions are mistaken; the ruling below is in substantial conflict with the previous decisions of this Court, and raise serious questions as to the constitutionality of USFSPA.

1. The government's discussion (U.S. Br. 7-9) of the

retroactive effects of USFSPA on those who entered the armed forces prior to its enactment in 1981, proceeds on three fatal assumptions: one factual, one procedural, and one precedential.

a. The government claims that the Act is not impermissibly retroactive because it does not "attach[] new legal consequences to events completed before its enactment." U.S. Br. 8 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994)). Aside from failing to note this Court's corollary comment in *Landgraf* – that "[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event," id. – the government's factual assumption fails to answer petitioners' contention that USFSPA did, in fact, upset settled expectations about the disposition of military retired pay as an inalienable and unencumbered personal asset of servicemembers.

Prior to USFSPA's enactment, only 11 states recognized the possibility of divisibility of military retired pay as part of a marital estate upon divorce. See Pet. 16 & n.2. It is simply extravagant to assert, as the government does here, that USFSPA "merely" restored the prerogative of state divorce courts to treat retired pay as a marital, instead of a personal, asset. U.S. Br. 8. USFSPA, coming after this Court's ruling in *McCarty v. McCarty*, 453 U.S. 210 (1981), represented a sea-change in the treatment of military retired pay, one that certainly qualifies under the *Landgraf* analysis as "attaching new legal consequences to events completed before its enactment," when viewed with the "nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." 511 U.S. at 269.

b. The Solicitor General has also assumed that

no petitioner had standing to challenge the retroactivity of USFSPA, because none joined the armed forces in the period between *McCarty*'s decision (in June 1981) and USFSPA's enactment (September 1982). See U.S. Br. 6, 8. While no named petitioner fits this category, the court below failed to consider whether any member of the associational plaintiff, ULSG, might qualify. As the district court found, there were members of ULSG who had joined prior to the USFSPA's enactment, Pet. App. 47a, but were disqualified by the district court on *Rooker-Feldman* and standing grounds from bringing a retroactivity challenge. Those grounds were reversed by the Fourth Circuit. See Pet. App. 9a-12a. The court of appeals ruled only that no named plaintiff had standing to bring a claim in regards to the period between June 1981 and September 1982, Pet. App. 15, without considering whether an individual member of ULSG fit that profile, as the district court found.

c. Lastly, the government makes an unavailing attempt to distinguish this Court's holding in *United States v. Larionoff*, 431 U.S. 864, 879 (1977), as standing for the proposition that Congress may not deny a military service benefit, once granted. The government appears to concede that *Larionoff* properly held that a retroactive denial of a military service benefit would present "serious constitutional questions," id., even where Congress sought expressly to later deny that benefit. U.S. Br. 9 (citing *Lynch v. United States*, 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935)). The government suggests that all USFSPA did was, in the wake of this Court's holding in *McCarty*, to restore state authority to divide military retired pay as part of a marital asset. U.S. Br. 8.

Left unmentioned by the Solicitor General is that the vast majority of servicemembers in 1982 had a valid expectation interest that their military retired pay was a *personal* asset, unencumbered by any claims by a marital estate, and not subject

to state law. Again, this is borne out by respondent Secretary's own report, that as of June 1981, the vast majority (39 of 50) of states had held that military retired pay was a personal asset. See Pet. 16 n.2. It is thus spurious to suggest that USFSPA changed nothing, and had no retroactive consequences for those already in the armed forces at the time of its enactment.

2. The government's grounds for disputing the validity and significance of petitioner's equal protection challenge are likewise unconvincing.

a. For starters, the parties do not agree on the relevant standard of review for petitioners' equal protection claim, and the government's reliance on *Heller v. Doe*, 509 U.S. 312 (1993), is unavailing, inasmuch as in *Heller* the challenger conceded the applicability of rational review. See id. at 319. And despite the government's suggestion, U.S. Br. 10 n.2, petitioners have argued, under this Court's decision in *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979), that Congress in adopting USFSPA "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse affects upon an identifiable group." Id. at 279.

As petitioners have demonstrated, see Pet. 19 n.3; Pet. App. 18a, there was "covert sex-based discrimination," id. at 274, in the adoption of USFSPA. Even the Act's concededly gender-neutral language of referring to "spouses" is belied by its references to servicemembers as being males, and the recipients of a divided marital estate as being women.[1] Moreover, as this

[1] See, e.g., 10 U.S.C. § 1408(c)(1) ("Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and *his* (continued...)

Court in *Feeney* observed, a requisite inference of discriminatory intent can be drawn from the "foreseeable consequences" of the legislation. Id. at 278; see also id. ("It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.").

And even if rational basis scrutiny is applied here, petitioners will maintain that USFSPA cannot satisfy that test. Insofar as the government argues that "Congress was concerned with the financial security of the military spouse who often makes enormous sacrifices in that role," U.S. Br. 10 (citing S. Rep. No. 502, 97th Cong., 2d Sess. 6 (1982)), such a rationale sweeps too broadly to support the Act.

b. The government as much as concedes (U.S. Br. 11) that this petition properly raises the question left open in *McCarty*, of "whether federal law prohibits a State from characterizing retired pay as deferred compensation," 453 U.S. at 223, even as it decided that military retired pay is "reduced compensation for reduced current services." Id. at 222 (citing *United States v. Tyler*, 105 U.S. 244, 245 (1881)). The government attempts to salvage its argument by relying on this Court's more recent decision in *Barker v. Kansas*, 503 U.S. 594

[1](...continued)
spouse in accordance with the law of the jurisdiction of such court."); 1408(c)(4) ("A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) *his* residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) *his* domicile in the territorial jurisdiction of the court, or (C) *his* consent to the jurisdiction of the court.") (emphasis added).

(1992), but that decision was expressly limited to the question of whether states can decline to treat military retired pay as a pension for purposes of intergovernmental tax immunity under 4 U.S.C. § 111. See 503 U.S. at 596, 605. *Barker* did not deal with characterizing military retired pay for purposes of distinguishing it as a personal asset, as opposed to a marital asset. See id. at 600-03. The government apparently concurs with this limited reading of *Barker*. See U.S. Br. 11-12.

Nevertheless, the government insists (U.S. Br. 12) that *Barker* forecloses petitioners' argument here. This cannot be the case because *Barker* specifically noted *McCarty*'s limited holding, see 503 U.S. at 601, and "'the possibility that Congress intended military retired pay to be in part current compensation for those risks and restrictions suggests that *States must tread with caution in this area*, lest they disrupt the federal scheme'." Id. at 602 (quoting *McCarty*, 453 U.S. at 224 n.6) (emphasis added by the *Barker* Court). Finally, *Barker* notes:

> Because the premise behind permitting the States to apply their community property laws to military retirement pay is that such pay is deferred compensation for past services, see *McCarty*, supra, at 221, Congress clearly believed that payment to military retirees is in many respects not comparable to ordinary remuneration for current services. To extend to States the option of deeming such benefits as part of the marital estate as a matter of state law would be inconsistent with the notion that military retirement pay should be treated as indistinguishable from compensation for reduced current services.

Id. at 603. It cannot be plausibly argued that this Court has granted an open license for state courts to "characterize military retired pay as deferred compensation" (U.S. Br. 12), for all

purposes.[2]

B. **Petitioners' Procedural Due Process and Uniformity Challenges to USFSPA Merit Review.**

1. a. The government suggests (U.S. Br. 3, 13) that regulations issued pursuant to USFSPA grant substantial procedural protections to servicemembers whose retired pay is being garnished by respondent Secretary's Defense Finance and Accounting Service (DFAS). As Petitioner has already explained, Pet. 4-5, 22, these lauded protections are largely illusory. The primary defect of the current scheme is that as long as a state court divorce decree appears "regular on its face," 10 U.S.C. § 1408(b)(2); Pet. App. 82a, DFAS will not further review the matter to determine whether the state court had proper personal jurisdiction over the military retiree, within the meaning of USFSPA section 1408(c)(4); Pet. App. 83a. See DODFMR ¶291003; see also Pet. App. 6a-7a; Brief *Amici Curiae* of American Retirees Association *et al.* 7-8. Moreover, the appeals procedures that the government cites, at 32 C.F.R. 282.5(b), are inapplicable to challenge DFAS's garnishments.

b. The government glibly overlooks the extent

[2] This tension has been noted in a number of recent cases, including *United States v. Sumrall*, 45 M.J. 207, 209 (C.A.A.F. 1996) ("Accordingly, a substantial question exists whether he has a legally sufficient property interest at the present time for purposes of a Due Process Clause claim. See *United States v. Larionoff*, 431 U.S. (1977); *Zucker v. United States*, 758 F.2d 637 (Fed. Cir.1985); see also *Norman v. United States*, 392 F.2d 255, 265 (Ct. Cl. 1968) (citing *Bell v. United States*, 366 U.S. 393 (1961)); but see *Barker v. Kansas*, 503 U.S. 594, 605 (1992) (military retirement benefits are to be considered deferred pay for past services for purposes of 4 USC § 111).").

to which the Fourth Circuit's use of *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924), infected its procedural due process calculus under *Mathews v. Eldridge*, 424 U.S. 319 (1976). As already explained, Pet. 23-24, the Fourth Circuit's emphasis on empirical evidence of DFAS errors in processing garnishment claims is directly related to its reading of *Endicott*'s now-discredited holding that no new process is due where garnishments were previously made by a state court. Moreover, there is substantial evidence of mistakes being made by DFAS, according to respondent Secretary's own findings. See Pet. 24 n.5 (citing DoD Inspector General reports).

2. As for petitioners' uniformity challenge, it is significant that the government offers no explanation as to the manifest disparities by state courts in the application of USFSPA's many material provisions. See Pet. 5. Indeed, it appears to accept the fact that retired servicemembers are subject to disparate treatment under the Act in many states, and no uniformity is present here. The government goes so far as to assert (U.S. Br. 15) that this was Congress's actual intent in legislating USFSPA. Such a position is unsustainable.

a. The government relies (id.) on cases decided under the Armed Forces Clauses to justify broad judicial deference to congressional action in this field, extending so far (as the government suggests) to the wholesale application of unfettered state law in the disposition of military benefits. But, as previously explained, Pet. 25-26, this Court's precedents do not sweep so broadly as to reach that result. Moreover, Congress, in enacting USFSPA, was responding to this Court's ruling in *McCarty*, which made express that

> there is a conflict between the terms of the federal retirement statutes and the community property right asserted by appellee here. But "[a] mere conflict in words is not sufficient"; the question remains

> whether the "consequences [of that community property right] sufficiently injure the objectives of the federal program to require nonrecognition." *Hisquierdo*, 439 U.S., at 581-583. This inquiry, however, need be only a brief one, for it is manifest that the application of community property principles to military retired pay threatens grave harm to "clear and substantial" federal interests. See *United States v. Yazell*, 382 U.S., at 352. Under the Constitution, Congress has the power "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST., Art. I, § 8, cls. 12, 13, and 14.

Id. at 232. By this Court's ruling in *McCarty*, Congress was under an obligation – in legislating the modalities of division of military retired pay under the Armed Forces Clauses – to do so in a uniform manner and failed to do so with USFSPA. See Brief *Amicus Curiae* of GI-JANES, at 8.

b. The government appears to concede (U.S. Br. 15) that an additional constitutional authority for Congress enacting USFSPA was the Full Faith and Credit Clause, but still insists that despite the textual qualification that Congress must act via "general Laws," U.S. CONST. Art. IV, § 1, such does not affirmatively oblige Congress to legislate uniformly. The uniformity commands of the Armed Forces and Full Faith Clauses operate in a different way than the Bankruptcy and Naturalization Clauses, precedents under which the government cites to argue that the only uniformity that Congress need legislate is an ostensible geographical conformity.

The primary constitutional defect of USFSPA, in this respect, is its unfettered grant to state courts to opt-out of uniform federal law in the disposition of military retiree benefits. Bankruptcy and naturalization decisions are made by

federal courts, applying federal law, and, to the extent authorized by Congress, state law. With USFSPA, Congress has wholesale delegated to the states the power to render non-uniform judgments as to military retired pay. Indeed, in one of the cases relied upon by the government, *Nehme v. INS*, 252 F.3d 415, 422 (5th Cir. 2001), the court of appeals made clear that Congress had to be express in allowing state courts to apply state law in construing a federal statute. See also *Nemetz v. INS*, 647 F.2d 432, 435-36 (4th Cir. 1981) (applying state law was inconsistent with the uniformity requirement of Naturalization Clause). This important question of the uniformity of federal military benefits law deserves review.

CONCLUSION

For the reasons herein stated, and those previously presented, the petition ought to be granted.

Respectfully submitted,

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No. 06-1132

IN THE SUPREME COURT OF THE UNITED STATES

Tammy Adkins, et al.,
Petitioners,

v.

Robert M. Gates,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMERICAN RETIREES ASSOCIATION, AIR FORCE SERGEANTS ASSOCIATION, FLEET RESERVE ASSOCIATION, NATIONAL ASSOCIATION FOR UNIFORMED SERVICES AND THE RETIRED ENLISTED ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Is the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408, unconstitutional, inasmuch as the statute (a) was retroactively applied to those service members who entered the Armed Forces prior to its enactment; (b) invidiously discriminates between male and female veterans and their former spouses; (c) contains garnishment mechanisms that do not afford sufficient procedural due process to veterans, and (d) has provisions that permit divorce courts of different jurisdictions to treat veterans disparately?

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INTEREST OF *AMICI CURIAE*

Amicus curiae American Retirees Association (ARA)[1] is a non-profit organization, chartered expressly to deal with the impact of the Uniformed Services Former Spouses Protection Act (USFSPA) (10 U.S.C. 1408) on personnel of the military uniformed services. ARA members are active duty, retired, reserve and National Guard members of the uniformed services of both sexes. Joining the brief as *amici curiae* are the Air Force Sergeants Association (AFSA), Fleet Reserve Association (FRA), National Association for Uniformed Services (NAUS), and The Retired Enlisted Association (TREA).

Amicus curiae AFSA is a federally chartered, non-profit organization representing the professional and personnel interests of more than 130,000 active duty and retired enlisted members of the U.S. Air Force, Air National Guard, and Air Force Reserve.

Amicus curiae FRA is the oldest and largest organization representing active, reserve, veterans, and retired enlisted personnel of the U.S. Navy, U.S. Marine Corps and U.S. Coast Guard. It is federally chartered and recognized by the Department of Veterans Affairs as an accrediting Veteran Service Organization for claim representation. It represents the enlisted perspective on issues affecting the military.

Amicus curiae NAUS is the only military affiliated association whose membership is open to all of the uniformed services: Army, Navy, Air Force, Marine Corps, Coast Guard, U.S. Public Health Service, National Atmospheric and Oceanic

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1 Counsel for *amicus curiae* American Retirees Association (ARA) authored this brief in whole and no other person or entity, other than the ARA, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Administration, National Guard, and reserve forces. NAUS serves all ranks and grades and represents a broad spectrum of interests.

Amicus curiae TREA was founded more than 40 years ago to protect the benefits of those who have served a career in the enlisted ranks of the U.S. military. TREA is a federally chartered Veteran Service Organization. With 55,000 members and an additional 15,000 personnel in its auxiliary, TREA is the largest organization of enlisted personnel comprising all branches of the military.

Service in the Armed Forces of the United States creates a special trust between service members and the federal government. Service members endure years of hardship during military service, separated from the comforts of home, friends and family, while relying on the federal government to provide the tools they need to serve. One of these is the freedom from inappropriate control by foreign governments and States of the Union.

Service members are all volunteers who serve overseas and within the borders of the United States, as needs of the Armed Services dictate. As such, members do not ultimately control where they are assigned, but may be sent involuntarily to various states and nations. However, as a result of actions taken in furtherance of federal service, they can be subject to the jurisdiction of courts of states other than those of their legal residence. A central premise to the concept of a federal military is that there cannot be significant differences in the treatment of service members among states in matters that interfere with federal control of the military forces.

This Court recognized the strong federal interests in the military retirement system in its decision in *McCarty v. McCarty*, 453 U.S. 210 (1981), holding that the military retirement pay could not be divided by state courts. In response,

Congress passed the USFSPA,[2] retroactive to the *McCarty* decision, to allow state courts to divide military retirement/retainer pay in a divorce. This case challenges the USFSPA as not providing sufficient protection for service members in the event of a divorce, thereby severing that special trust between service members and the federal government.

Amici curiae ARA, AFSA, FRA, NAUS and TREA accept the factual basis provided by appellant's petition and hereby incorporate these facts by reference.

SUMMARY OF THE ARGUMENT

The retirement/retainer pay of the members of Armed Forces of the United States has been determined by this Court to be a very special type of compensation. If state courts are to be allowed to divide it during a divorce, the overwhelming federal interests and purposes in this pay must not suffer, nor should the due process rights of the service members involved suffer. However, both federal interests in military retirement pay and the due process rights of members do indeed suffer when state courts are essentially left unchecked to do what they please. Service members, whether on active duty or in the retired reserve, are fulfilling a federal purpose under the Constitution. States exercising their responsibilities for domestic issues must not be permitted to frustrate this federal purpose.

ARGUMENT

I. Review is necessary to establish that state court division of military retirement pay requires the establishment of

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2 Pub. L. No. 97-252, 96 Stat. 730 (1982)(codified at 10 U.S.C. § 1408 (2006)).

federal common law to address federal concerns in this area of substantial state and federal interests.

The issue of military divorce presents a question of mixed state and federal concerns that needs to be resolved to ensure that both equities are addressed. Since the ability to control marriage and divorce is not a federal power enumerated in the Constitution, it is reserved to the States. U.S. CONST. amend. X. However, the federal government is charged with administration of the Armed Forces. U.S CONST. art. I, § 8, cl. 12, 13 & 14. The intersection of these rights is of great concern to the Department of Defense, which devotes substantial efforts to family issues. *See Family Policy, Department of Defense Directive 1342.17* (1988). Through these efforts, the Armed Forces recognize the substantial and real impact that family concerns have on military readiness.

This unique intersection of state and federal interests in the issue of military divorce begs for the establishment of a federal common law regarding the treatment of federal military retirement/retainer pay.[3] This Court has previously noted the unique characteristics of the military retirement/retainer pay in the *McCarty* decision, 453 U.S. at 212-14. These unique characteristics were carried through when Congress passed the USFSPA, noting in the statute the uniqueness of this pay to members of the retired reserve. *See* 10 U.S.C. § 1408(c)(2).

The recognition of the need for "federal common law" on an issue is well established by this Court. Specifically, this

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[3] This brief will use the term "military retirement/retainer pay" instead of "military pension" because of the numerous conditions on the service member associated with accepting this pay. This also comports with the IRS definition of this pay in accordance with 26 C.F.R. S31.3401(a)-1(b)(1)(ii).

Court has found that when an issue is normally a matter of state law, but uniformity is required to attain federal objectives, creation of federal common law for the issue is justified. *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979). Just as environmental matters that do not recognize state borders justify the existence of a federal common law, *see State of New York v. National Service Industries, Inc.*, 460 F.3d 201 (2nd Cir. 2006), the common defense of the United States cannot recognize state borders. U.S. CONST. pmbl. (providing for the "common defense"). Therefore, the creation of a federal common law for the issue of a military retirement/retainer pay is consistent with this Court's precedents.

The USFSPA does not provide appropriate guidance to the states to protect federal interests. In the absence of the USFSPA, this Court correctly decided that state courts cannot divide military retirement/retainer pay. *McCarty*, 453 U.S. at 210. However, the USFSPA, as a Congressional response to this Court's holding in *McCarty*, does not provide the mechanism to standardize the application of the law by state courts. Rather, it merely provides a mechanism for the military pay finance centers – the Defense Finance and Accounting Service (DFAS) -- to recognize and apply state court orders regarding division of military retirement/retainer pay. 10 U.S.C. § 1408(c) and (d).

In short, the USFSPA gives permission but not the guidance necessary to address valid federal concerns. Therefore, the USFSPA is fatally flawed and must be reviewed by this Court in that light.

II. The USFSPA creates an inappropriately low standard for a court order to divide military retirement/retainer pay that violates the due process rights of service members.

The USFSPA takes numerous impermissible shortcuts impacting due process in its attempt to create an easily-implemented process to deprive service members of pay to which they are legally entitled. The entitlement to military retirement/retainer pay is provided by federal law. 10 U.S.C. § 1409. It is legally considered to be "pay" because the member is still considered to be a member of the Armed Forces, *United States v. Tyler*, 105 U.S. 244, 246 (1881), subject to military justice, 10 U.S.C. § 802(a)(4) and involuntary recall to active duty. 10 U.S.C. § 688(a)-(b)(1). State court division of this pay, with no reduction in such federal requirements, deprives a member of a valuable personal entitlement.

The USFSPA, as the mechanism for this, bypasses normal due process protections. Beginning with the established standard that a citizen is subject only to the courts of his/her state, U.S. CONST. amend. XIV, §1, an out-of-state order for USFSPA need only be submitted to the military finance center by the former spouse. 10 U.S.C. § 1408(d)(1). The only requirement is that it be "regular on its face." 10 U.S.C. § 1408(b)(1)(B). There is no provision requiring validation of this order by the member's home state. In fact, the submission of a state's order appears to create an unrebuttable presumption that no other state's order is valid. 10 U.S.C. § 1408(d)(7).

Normally, a citizen may challenge enforcement of an out-of-state order against him in his own state, with the Constitutional requirement for honoring out-of-state orders based on "full faith and credit" subject to a finding that the court issuing the order had jurisdiction. *See, e.g., Jordan v. Jordan,* 586 A.2d 1080, 1085 (R.I.1991) (requiring subject matter and personal jurisdiction requirements to be met before enforcement of out-of-state judgments). However, the USFSPA violates this concept by honoring any order submitted by any state. By omitting a procedure to challenge court orders submitted in a

proper forum, the USFSPA violates the due process rights of affected service members.

III. The USFSPA has spawned a new source of jurisdiction that does not protect Constitutional rights of service members.

In the exercise of their powers granted by the USFSPA, states have gone beyond the normal confines of jurisdiction to create a new type of jurisdiction – "*in filium*[4]" – that violates the Constitution and public policy. The USFSPA allows states to divide military retirement/retainer pay in a divorce if the state has jurisdiction over the service member either through domicile, residence or consent. 10 U.S.C. § 1408(c)(4). Although the concepts of domicile and residence comport well with the commonly accepted interpretation of personal jurisdiction, the third method is open to unbridled judicial abuse.

The question of "consent" of the service member to the division of military retirement/retention pay by a state during a divorce proceeding has been answered differently by the several states. Some states require specific consent to the division of the military retirement/retainer pay, *see, e.g., Flora v. Flora*, 603 A.2d 723 (R.I. 1992), while other states find sufficient jurisdiction over the military retirement/retainer pay through any participation in the divorce proceedings. *See, e.g., Seeley v. Seeley*, 690 S.W:2d 626 (Tx. Ct. App. 1985).

For the service member with children, this situation may present a Catch-22 situation if the spouse unilaterally initiates a divorce action in a state where she/he qualifies to bring an action. In such cases, the service member may be locked into

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4 This reflects an attempt to name jurisdiction that is created through the child.

non-resident jurisdiction through no action of his/her own, but solely by the action of a now-adverse party.

It is logical for a court where minor children are located to provide for their welfare in a divorce. But if the service member participates at all in the action, courts in such states would find jurisdiction sufficient to trigger entry of an order to divide military retirement/retainer pay that would appear "regular on its face." To allow such action is counter to domestic relations public policy -- both parents should be able to participate in matters related to the children's welfare without putting their own interests at risk. Such a view is consistent with the Court-recognized concept of the "divisible" divorce. *See Rice v. Rice*, 336 U.S. 674 (1949).

Especially for active military members subject to deployments in support of military operations, consideration of the children's best interests may dictate allowing the non-military spouse to have unchallenged primary physical custody of minor children and cooperate in implementation of that custody without putting themselves in jeopardy.

The concept of implied consent to division of military retirement/retainer pay essentially creates a new type of jurisdiction to complement the well-recognized concepts of *in personam* jurisdiction, *in rem* jurisdiction, and *quasi in rem* jurisdiction. The commonly recognized concept of "consent" to relinquishment of a known right requires that it be "knowing." *Estelle v. Smith*, 451 U.S. 454, 471 (1981). State courts should not be able to use minor children to create personal jurisdiction in a divorce. In tripping over themselves to find personal jurisdiction over a service member to be able to divide military retirement/retainer pay, many state courts have ventured into Constitutional issues that should exclusively be the province of this Court.

CONCLUSION

The USFSPA, as passed by Congress to supercede this Court's reasoned holding in *McCarty*, suffers from fatal Constitutional flaws and should be reviewed by this Court by grant of the petition.

Respectfully submitted,

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Tammy Adkins, et al.,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR GI-JANES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Is the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, unconstitutional, inasmuch as the statute (a) was retroactively applied to those service members who entered the armed forces prior to its enactment; (b) invidiously discriminates between male and female veterans and their former spouses; (c) contains garnishment mechanisms that do not afford sufficient procedural due process to veterans; and (d) has provisions that permit divorce courts of different jurisdictions to treat veterans disparately?

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INTEREST OF AMICUS CURIAE[1]

The GI-JANES (Get Involved – Join Against Never-ending Ex-spouse Support) is an organization composed of women dedicated to the revocation of the Uniformed Services Former Spouses Protection Act of 1982 (10 U.S.C. § 1408). The group consists mainly of female active duty, reserve, and retired service members of the Army, Navy, Air Force, Marine Corps and Coast Guard who are either divorced or in the process of a divorce and are affected by this statute. Other members include women, who are ex-spouses, entitled to a portion of the retired pay of a former military spouse but who have waived such a payment on moral grounds. Also, included are "second wives" – those women married to active military personnel or military retirees who are denied the benefits of being a part of the military family that are available to a "first" wife.

The members of the Armed Services of the United States are honored to serve the nation. As a result of such service, they endure years of hardship, often involving deployment to remote locations separated from the comforts of home, friends and family. These places may be austere, temporary locations with the daily threat of enemy attack. A compelling motivation during such times is the promise that at the end of that service, they will have the opportunity to continue to serve the nation as members of the retired reserve, waiting to be called again in defense of America, but with the opportunity to pursue their

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[1] Counsel for amicus curiae authored this brief in whole and no other person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

personal dreams as had necessarily been put on hold to serve.

Service members are all volunteers who serve in various locations around the world, both overseas and within the borders of the United States, as the needs of Armed Services dictate. As such, members do not ultimately control where they are assigned, but may be sent involuntarily to various states and nations. Therefore, service members depend upon the federal government to protect them from inappropriate, arbitrary and inconsistent use of powers by the states and nations. Since only approximately 1% of the population serves in the military, when discriminated against these citizens have no strength in numbers to have enough political clout to protect themselves. Although in federal service, service members still desire to exercise their rights as members of society to drive automobiles, vote in federal elections, and marry—all actions that fall primarily to the states under the American system of government—but in which the federal government has a vested interest and Constitutional obligation to protect service members.

The American Armed Forces are one of the greatest equalizers, with equal opportunity assured for all based on law, custom and practice. As a result, the Armed Forces continue to attract volunteers of all races, heritage, and gender. The special opportunity for female service members to be mothers as well as soldiers, sailors, marines, airmen and coastguardsmen is perhaps the most salient example of the commitment of the Armed Forces to equal opportunity.

All citizens of the United States must be citizens of a state to be full members of American society. Service members are no exception. However, as a result of actions taken in furtherance of federal service, they can be subject to the jurisdiction of courts of states other than those of their legal residence. A central premise to the concept of a federal military

is that there cannot be significant differences in the treatment of service members between states in matters that interfere with the concept of federal control of the military.

This Court recognized the strong federal interests in the military retirement system in its decision of McCarty v. McCarty, 453 U.S. 210 (1981), holding that the military retirement pay could not be divided by state courts. In response, Congress passed the Uniformed Services Former Spouses Protection Act (USFSPA), retroactive to the McCarty decision, to allow state courts to divide the military retirement/retainer pay in a divorce. This case challenges the USFSPA as not providing sufficient protection for service members, and particularly female service members, in the event of a divorce.

Amicus GI-JANES accepts the factual basis in the appellant's petition and hereby incorporate these facts by reference. Both parties have consented to submission of this brief.

REASONS FOR GRANTING THE PETITION

SUMMARY OF THE ARGUMENT

This Court has, over the years, helped shape the characterization of the military retirement system. There can be no doubt as to the substantial federal interest in the fairness and operation of the military retirement system. Therefore, when federal legislation allows state courts to divide military retirement pay during a divorce, but does not ensure that the federal interests and Constitutional rights of the service members are properly protected, such legislation must fail.

ARGUMENT

A. The USFSPA Has Had A Disparate Impact on Female Service Members In That It Provides No Enforcement Mechanism for Service Members Who Are Custodial Mothers.

The USFSPA is biased against service members in the enforcement of child support and support for spousal abuse. Additionally, the fact that these constitutionally-fatal flaws affect female service members more often than males should result in the Court's review of this case.

USFSPA specifies that the service member may have a maximum of 65% of retired pay distributed directly by the military finance center to a former spouse through a combination of division of retired pay and child support. 10 U.S.C. § 1408e(4)(B). However, there is no provision for the former spouse's share to be reduced by child support, so the service member is forced to seek enforcement through other means. This discriminates against service members in favor of the former spouses in general, and since mothers consistently receive custody of children in a divorce at a higher rate than fathers, *See* Thomas R. Trenkner, J.D., Annotation, *Modern Status of Maternal Preference Rule or Presumption in Child Custody Cases*, 70 A.L.R.3d 262 (2007), female military members are disparately burdened by this discrepancy.

The second area of discrimination is even more disturbing. Since passage of the National Defense Authorization Act for Fiscal Year 1993[2], the entitlement to a portion of the retirement/retainer pay of a former spouse abused by a servicemember is protected. 10 U.S.C. § 1408(h).

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[2] Pub. L. 102-484, 106 Stat. 2426

However, the reverse is not true; when state courts can and do award a portion of the retirement/retainer pay to the abusive former spouse, this only intensifies and prolongs the agony of the abused service member. Since abuse victims are predominately women, National Coalition Against Domestic Violence, *Domestic Violence Facts*, *at* http://www.ncadv.org/files/DV_Facts.pdf, this discriminatory treatment harms service members in general and therefore also has a disparate impact on women.

Since both these discriminatory omissions have no discernable or logical rational basis, the discrimination is unconstitutional, without even considering the higher intermediate standard that should be applied to the disparate impact on women.

B. The Societal Circumstances That Created the Basis for the USFSPA No Longer Exist.

The USFSPA was enacted in response to this Court's decision in *McCarty*. The language indicates that wives of military men were the target group for protection since the expectation was that they, especially at senior levels, were to support their husband's career, often at the expense of their own. *See* S. REP. NO. 97-502 (1982) as reprinted in 1982 U.S.C.C.A.N. 1596. However, there has been a drastic shift in this norm in two respects: the support for careers of military spouses and the advent of women in the Armed Forces.

The USFSPA was designed to remedy the situation of a former spouse who had sacrificed her career for that of her husband under the assumption that the military required the spouse to support the military member's career. This situation was recognized and remedied by Congress in the Defense

Authorization Act for Fiscal Years 1988 and 1989.[3] As a result, the right of military spouses to have careers was established as Department of Defense policy. Department of Defense Directive 1400.33, Employment and Volunteer Work of Spouses of Military Personnel, Feb. 10, 1988. However, this document was suspended in a routine revision of directives because it was obsolete, Removal of Obsolete Regulations, 71 Fed. Red. 49348, Aug. 23, 2006, indicating the changing attitudes towards working spouses. Although hearings prior to passage of the USFSPA included comments on officer evaluations regarding comments about the wife's support of the military man's career, such comments are prohibited by the Armed Forces (see, e.g. Air Force Instruction 36-2406, Officer and Enlisted Evaluation Systems, 15 April 2005), and have been since 1988, so no longer can the wife's support be regarded as directly supporting or hindering the military man's career. At the present time, it is estimated that 70% of military spouses work, OFFICE OF THE UNDERSECRETARY OF DEFENSE FOR PERSONNEL AND READINESS, MILITARY PERSONNEL HUMAN RESOURCES STRATEGIC PLAN (CHANGE 1) (2002), in contrast to the original 1982 testimony before Congress portraying the typical spouse at that time as a nonworking wife who devoted her full time to her husband and family. MARSHA L. THOLE & FRANK W. AULT, DIVORCE AND THE MILITARY II: A COMPREHENSIVE GUIDE FOR SERVICE MEMBERS, SPOUSES, AND ATTORNEYS (1998). So the need for such special protection no longer exists.

In addition to the shift from non-working to working spouses, the demographics of the Armed Forces have changed as well. This change was already taking shape at the time

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[3] Pub. L. 100-180, Sec 637

USFSPA was passed by Congress. The numbers of women on active duty in the Armed Forces was already on the rise and had risen from 1.6% in 1973 to just less than 9% by 1982. Additionally, 1980 was historic in that it was the first year that women graduated from all four of the Service Academies. As a result, today women compose 11.5-12% of senior officers at the rank of colonel/captain (grade of 06) in the Army, Air Force and Navy in contrast to composing less than 2% of that rank for all Services in the early 1980's. Similar such increases have occurred since 1982 in the senior enlisted ranks of E7-E9 for all of the Services. Today, women compose approximately 17 % of the Armed Forces, with the Army, Air Force and Navy Reserves each composed of over 20% of women. LORY MANNING, WOMEN'S RESEARCH & EDUCATION INSTITUTE, WOMEN IN THE MILITARY; WHERE THEY STAND (5th ed. 2005). As such, historic assumptions about divorce for the protection of women are not only constitutionally suspect but also inaccurate. Military marriages today include substantial numbers of female service members married to civilian males. Divorce results in many of these military women being forced to forfeit large portions of their retirement pay for the rest of their lives to ex-husbands who have successful careers and often are earning substantially more than the these women are earning.

Since the USFSPA reflects historical assumptions that do not hold true today, the law—as the only federal divorce law in existence--is an anachronism that is not reflective of a society evolving to show greater opportunity for women. Therefore, the USFSPA as written disparately restricts the rights of service women and should be reviewed by the Court.

C. It Is Essential To The Constitutional Concept Of Common Defense That Service Members Be Treated Equally By State Courts.

One of the basic foundations of the Constitution is the need for a common defense. US Const. pmbl. This purpose carries through the provisions addressing defense in the powers of Congress. U.S. Const. art. I, § 8. Just as the Court has broadly applied the "time, manner, place" provisions of the Elections Clause in Section 4 of Article 1, *see e.g. Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002), the need for a "common" defense should be broadly applied to include a common application of the rules applicable to military personnel. This would be consistent with the application of other provisions in the same section where the Court and Congress have ensured uniform application through the U.S. for those provisions. For example, the rules for naturalization, copyrights, money, patents, and the post office, are all controlled by federal law (Titles 8, 17, 31, 35, and 39 of the U.S. Code, respectively) and the regulation of interstate commerce is the construction of the Courts. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984).

The current system for division of military retirement under the provisions of 10 U.S.C. § 1408 begs for such standardization. There are fifty different standards for dealing with military retirement / retainer pay. MARK E. SULLIVAN, THE MILITARY DIVORCE HANDBOOK 430 (2006). One particular area of uneven interpretation and application is with regards to the jurisdiction of state courts. With the advent of the current no-fault divorce system, subject matter jurisdiction for state courts vests in as little as six weeks. *See, e.g.* NEV. REV. STAT. § 125.020 (2006). In recognition of this fact, Congress stipulated that state court orders dividing military pay could only be

recognized if the court had jurisdiction over the service member either through residence, domicile or consent of the service member. 10 U.S.C. § 1408c(4). Although the criteria of domicile and residence have a solid history of application and acceptance, the criteria of consent of the service member has been subject to two schools of thought: (1) either consent must be specific to the division of military pay or (2) that any response to the suit subjects the military member to the court—even a suit where there would be lack of personal jurisdiction under this Court's sufficient contacts test. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945). State courts have split on this question, finding both the former, *see, e.g. Flora v. Flora*, 603 A.2d 723 (R.I. 1992), and the latter, *see Seeley v. Seeley*, 690 S.W.2d 626 (Tx. Ct. App. 1985). This has been best phrased by a California judge in an unpublished opinion – "In order for a court to obtain jurisdiction to divide a pension by way of consent, it makes sense that such consent should be to the division itself, and not to some ancillary matter." *In re Stroup*, No.D030869, 2003 Cal. App Unpub. LEXIS 4687 at *4 (Cal. Ct. App. May 13, 2003). Such a major split in interpretation of this statute should be sufficient to compel review by this court.

There are two general aspects of the divorce case – the family issues and the property issues. With regards to the divorce issues, the no-fault system was designed to facilitate the resolution of family matters, and as a policy, to facilitate the resolution of issues relating to minor children. However, children issues are not permanent and can be adjusted to changing circumstances whereas property issues are resolved once and not addressed again. *See, e.g.* N.H. REV. STAT. ANN. Ch. 458.

As a result, there is both a public policy reason and a

philosophical reason to treat these differently. From a public policy point of view, it is desirable to simplify resolution of child support and child custody issues in order to mitigate the impact of divorce on any minor children. Therefore, participation of both parties is desirable. However, constitutional restrictions on state powers limit the ability of states to interfere with the rights of citizens of other states. *See* U.S. CONST. amend. XIV. It has been long recognized that out-of-state residents should have access to federal courts to ensure a fair hearing on issues in another state. *See* 16 JAMES WM. MOORE ET AL, MOORE'S FEDERAL PRACTICE §107.03 (3rd ed. 1997). Therefore, to ensure this type of fairness for service members within the reach of a state court due to their military service, this protection should be afforded to them as well.

It has also been long established by this court that state courts may be limited in their rulings in divorce proceedings. The concept of a "divisible divorce" recognizes that a court has only the power to divide the property under its control. *See Rice v. Rice*, 336 U.S. 674 (1949). The USFSPA did nothing to change this but in fact emphasized this fact by stressing the necessary jurisdiction, 10 U.S.C. § 1408c(4), but provides no enforcement mechanism to protect the rights of service members.

Since the passage of the USFSPA, Congress has acted to ensure the uniform rights and standards in traditional areas of state control that affect service members – driver's licenses, voting and marriage. For example, Congress has enacted the REAL ID Act of 2005[4] that set standards for state drivers' licenses, the Help America Vote Act of 2002[5] to ensure the voting rights of service members, and the Defense of Marriage

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[4] Pub. L. 109-13, 119 Stat 231

[5] Pub. L. 107-252, 116 Stat. 1666

Act[6] to provide uniformity in marriage across the fifty states. As such, Congress has signaled an intent that traditional areas of states rights are subject to federal standardization when substantial federal interests are involved. Disparities under the USFSPA contravene this recent trend.

If the lower court ruling stands, even the out-of-state military member or retiree will have to rely on the courts in the state where the spouse desires a divorce to balance these important state and federal concerns.

D. USFSPA Is No Longer Needed To Protect The Rights Of Former Spouses.

If this Court were to grant the petition and later strike down the USFSPA, states would still retain the ability to protect former spouses with a structure of alimony and divison of a pension-like system now. Unlike the divison of military pay which is for life, alimony is provided under state laws in limited circumstances and duration that emphasize equitability. Mei Fung Soo, J.D., Annotation, *Propriety of Equalizing Income of Spouses Through Alimony Awards*, 102 A.L.R.5th 395 (2007). The former spouse also retains any rights to Social Security provided under the military member's creditable work if the spouse would have a smaller claim based on her/his own work history. *See* 42 U.S.C. § 402(b). Since the USFSPA was enacted, Congress has allowed military members to participate in the federal Thrift Savings Program (TSP) that functions as a retirement plan. *See* 5 U.S.C. § 8432b. Unlike the military retirement/retainer pay, which is subject to very special considerations, *see* 10 U.S.C. § 1408(c)(2), TSP is similar to

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[6] Pub. L. 104-199, 110 Stat. 2419

other retirement plans that have a cash value that can be determined and divided by a state court so that the former spouse can be equitably compensated without the concerns raised by the Court in *McCarty* nor the special conditions recognized by Congress in the USFSPA.

Therefore, if the Court grants the petition, hears the case and strikes down the statute, former spouses will still have adequate protection through resources that would still be available for state court division and will not be "thrown to the wolves."

CONCLUSION

When Congress passed the USFSPA as a rejection of this Court's sound logic in the McCarty decision, they failed to provide adequate protection for service members operating under the U.S. Constitution, with a hugely disparate impact on female service members, especially those who are mothers. Therefore, in this light, the petition should be granted for a review of the USFSPA by the Court.

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